

Jeffrey B. Isaacs, Esq., SBN 117104
Jerome H. Friedberg, Esq., SBN 125663
Paige Shen, Esq., SBN 162122
William Seldeen, Esq., SBN 222388
ISAACS | FRIEDBERG LLP
555 South Flower Street, Suite 4250
Los Angeles, California 90071
Phone: (213) 929-5550 / Facsimile: (213) 955-5794
Email: jisaacs@ifcounsel.com

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JUDITH ALLEN, *et al.*,
Plaintiffs,
vs.
GIRARDI | KEESE, *et al.*,
Defendants.

Case No. 14- CV-02721-MWF-FFM

Hon. Frederick F. Mumm

**JOINT STIPULATION REGARDING
PLAINTIFFS' MOTION FOR
MONETARY SANCTIONS AS
PREVAILING PARTY IN PRIOR
DISCOVERY MOTIONS**

**[PLAINTIFFS' DISCOVERY
MOTION NO. 7]**

[Concurrently filed with Notice of Motion;
Declaration of Jerome H. Friedberg; and
exhibits]

Complaint Filed: Apr. 9, 2014
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Discovery Cutoff: May 27, 2016
Trial Date: Sep. 6, 2016

Hearing

Date: June 7, 2016
Time: 10:00 a.m.
Room: 580, 5th Floor

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JOINT STIPULATION

The parties submit this Joint Stipulation regarding Plaintiffs' Discovery Motion No. 7 for Monetary Sanctions as Prevailing Party in Prior Discovery Motions.

I. INTRODUCTION.

A. Plaintiffs' Introduction.

Under Fed. R. Civ. P. 37(a)(5), the "court must . . . require the party . . . whose conduct necessitated the motion[s] . . . to pay the . . . reasonable expenses incurred" by the prevailing party. Pursuant to this Rule, Plaintiffs move for an order requiring Defendants Girardi | Keese ("GK"), Thomas Girardi and James O'Callahan (collectively, "Defendants") to pay Plaintiffs' reasonable expenses, including attorney's fees, incurred in connection with six discovery motions on which Plaintiffs prevailed. These include four motions to compel brought by Plaintiffs, one motion to quash a subpoena for bank records brought by Defendants and one motion for review also brought by Defendants.

In ruling upon Plaintiffs' Discovery Motion No. 1, the Court found that Defendants lacked substantial justification for asserting untimely boilerplate objections. The Court warned Defendants at that time that it would issue sanctions if it were again required to rule on issues that have already been addressed:

[I]f we get another motion, I will look at it but I must admit that it seems to me *almost every single issue involved in this motion I previously ruled upon on other motions*. I don't want to rule upon the same issue again. And if I do, then what I'll do is I will ask for declarations regarding attorneys' fees incurred in *the prior motions*, and so we can add those up But certainly whether they want it or need it, *if it's relevant to a claim or defense, they're entitled to it and they're going to have it*.

July 21, 2015 Hr. Tr., pp. 19-21 (emphasis added), attached as Exhibit K to the Declaration of Jerome Friedberg ("Friedberg Decl.").

The Court subsequently awarded Plaintiffs their reasonable expenses incurred in having to bring that motion, finding at that time that Defendants' conduct was thwarting the discovery process:

At last count, plaintiff have defended two motions to quash subpoenas and have filed four motions to compel in their attempt . . . to find out what happened to the settlement funds. Underpinning all of these motions is what appears to be an attempt by defendant to avoid, or at least delay, providing to plaintiffs the very information and documents required to conduct a proper audit.

Id., ¶ 3; Ex. I (Oct. 26, 2015 Order Granting Plaintiff's Request for Payment of Expenses Incurred in Connection with Motion to Compel No. One, Dkt. 187), p. 2.¹

Ignoring these warnings, Defendants continued to raise and stand on frivolous objections to Plaintiffs' written discovery requests, requiring Plaintiffs to file multiple discovery motions to overcome objections that had been overruled on multiple occasions. Plaintiffs have now won all eight discovery motions against Defendants, as summarized in the chart below, and thus seek the monetary sanctions indicated:

Motion	Outcome	Expenses Incurred
Defendants' Motion to Quash Document Subpoena for Torrey Pines Bank Records. (Dkt. 60)	Defs.' Mot. DENIED (Dkt. 127)	\$31,488.00
Plaintiffs' Discovery Motion No. 1: Motion to Compel Production of Withheld Documents and Further Responses by Defendant Girardi Keese to Requests for Production of Documents, Set One. (Dkt. 72)	Pls.' Mot. GRANTED (Dkt. 94)	Fees Previously Granted
Defendants' Motion for Review of Magistrate Judge's Order Granting Plaintiffs' Motion to Compel Production of Withheld Documents. (Dkt. 97)	Defs.' Mot. DENIED (Dkt. 114)	\$14,924.00

¹ Defendants still have not produced these records, despite three court orders directing them to do so. Friedberg Decl., ¶ 29; Ex. AA; *see* Dkt. 202-2, pp. 11-16.

Motion	Outcome	Expenses Incurred
Plaintiffs' Discovery Motion No. 2: Motion to Compel Verified Substantive Answers to Interrogatories, Set Two. (Dkt. 106)	Pls.' Mot. GRANTED (Dkt. 128)	\$18,171.20
Plaintiffs' Discovery Motion No. 3: Motion to Compel Substantive Answers to Interrogatories, Set Three. (Dkt. 109)	Pls.' Mot. GRANTED (Dkt. 169)	\$14,792.80
Plaintiffs' Discovery Motion No. 4: Motion to Compel Further Responses to Request for Production of Documents, Set Two. (Dkt. 124)	Pls.' Mot. GRANTED (Dkt. 176)	\$22,992.80
Plaintiffs' Discovery Motion No. 5: Motion to Compel Further Responses to Interrogatories, Set One. (Dkt. 152)	Pls.' Mot. GRANTED (Dkt. 190)	\$21,123.20
Plaintiffs' Discovery Motion No. 6: Motion to Compel Net Worth Discovery. (Dkt. 223)	Pls.' Mot. GRANTED (Dkt. 227)	Fees Previously Denied
Expenses Incurred and Anticipated in This, Plaintiffs' Discovery Motion No. 7.	Pending	\$27,683.20
Total Sanctions Sought:		\$151,175.20

In addition to Rule 37, an award of expenses is appropriate here pursuant to 28 U.S.C. § 1927 and the Court's inherent authority, which empower the Court to award sanctions against Defendants for their bad faith litigation tactics.

Finally, Plaintiffs are also entitled under Rule 37 to compensation for the reasonable expenses incurred in having to bring and prosecute this motion for monetary sanctions.

Prior to filing this motion, Plaintiffs' counsel met and conferred in person with Defendants' counsel. Friedberg Decl., ¶¶ 27-28. The parties, however, could not resolve their dispute, necessitating the filing of this motion. *Id.*

For these and the reasons discussed below, the Court should order GK, Mr. Girardi and Mr. O'Callahan to pay to Plaintiffs monetary sanctions in the total

1 amount stated above.²

2 **B. Defendants' Introduction.**

3 Defendants Thomas V. Girardi, James G. O'Callahan, and Girardi | Keese
4 (collectively, "Defendants") oppose Plaintiffs' Rule 37 Motion for Monetary
5 Sanctions as Prevailing Party in Prior Discovery Motions ("Motion" or "the instant
6 Motion") on the following grounds: first, Plaintiffs' unreasonable delay in bringing
7 this Motion renders it untimely; second, Defendants have not violated any
8 discovery order entered by the Court here; and, third, Defendants' were
9 substantially justified in their positions in responding to Plaintiffs' discovery
10 requests and opposing Plaintiffs' resulting Motions to Compel, thus precluding
11 attorney's fees and sanctions under Rule 37.

12 First and foremost, Plaintiffs have unreasonably delayed in filing this motion
13 seeking discovery sanctions, [# of months] after the Court granted Plaintiffs' most
14 recent discovery motion, Discovery Motion No. 6, on April 1, 2016. (Dkt. No.
15 227.). Notably, although the court granted Plaintiffs' Discovery Motion No. 6 (a
16 motion to compel net worth discovery, *See* Dkt No. 223), the Court denied
17 Plaintiffs' In the instant Motion, Plaintiffs fail to offer any explanation for their
18 delay, instead choosing to ignore the significant lapse of time between the filing of
19 the instant Motion and the dates the Court entered orders on the six discovery
20 motions in which Plaintiffs prevailed and seek sanctions for here.³ Consequently,
21
22

23 ² Plaintiffs are not seeking sanctions against Defendants' outside counsel,
24 Baker, Keener & Nahra LLP.

25 ³ For example, here, Plaintiffs seek \$31,488 in expenses incurred in connection with
26 Defendants' Motion to Quash Document Subpoena for Torrey Pines Bank Records
27 (Dkt. No. 60). The Court entered its order denying Defendants' motion (Dkt. 127)
28 on September 17, 2015. Plaintiffs now seek costs 8 months later. This is a
substantial and unreasonable delay for which Plaintiffs have not offered any
explanation. Plaintiffs should not be rewarded for this delay.

1 Plaintiffs' dilatory conduct in bringing the instant Motion is unreasonable and
2 should not be rewarded by the Court.

3 Importantly, pursuant to Rule 37, discovery sanctions are appropriate only
4 when a party violates a Court order in bad faith. Defendants here have not willfully
5 violated any Court order entered by the Court in this case. While Plaintiffs would
6 have the Court believe that Defendants have acted in bad faith in responding to
7 each and every set of discovery propounded, such belief is merely an assumption
8 that is unfounded based on the evidence at hand and inconsistent with Defendants'
9 responses to said discovery. Defendants have not withheld any information
10 responsive to Plaintiffs' interrogatories and/or requests for production. In response
11 to Plaintiffs' interrogatories, Defendants exercised their right to object to the
12 breadth and relevance of the interrogatories and subsequently oppose the resultant
13 motion to compel filed by Plaintiffs. When this Court overruled Defendants'
14 objections and ordered Defendants to produce further responses, Defendants did so
15 within the timeline set by the Court in the respective order granting each of
16 Plaintiffs' motions to compel. To date, Defendants have produced information
17 responsive to Defendants' requests and produced supplemental responsive
18 information and/or documents to said requests.

19 Accordingly, Plaintiffs' Motion for Monetary Sanctions should be denied in
20 its entirety.

21 **II. PLAINTIFFS' REQUEST FOR MONETARY SANCTIONS**
22 **PURSUANT TO FED. R. CIV. P. 37(a)(5).**

23 **A. Fed. R. Civ. P. 37(a)(5).**

24 ***1. Plaintiffs' Position.***

25 Rule 37 of the Federal Rules of Civil Procedure mandates that the Court
26 award the prevailing party in a motion to compel discovery monetary sanctions,
27 subject to three narrow exceptions:

1 If the motion is granted – or if the disclosure or requested discovery is
2 provided after the motion was filed – ***the court must***, after giving an
3 opportunity to be heard, ***require the party*** or deponent whose conduct
4 necessitated the motion, the party or attorney advising that conduct, or
5 both to pay the movant’s reasonable expenses incurred in making the
6 motion, including attorney’s fees. But the court must not order this
7 payment if:

- 8 (i) the movant filed the motion before attempting in good faith to
9 obtain the disclosure or discovery without court action;
10 (ii) the opposing party’s nondisclosure, response, or objection was
11 substantially justified; or
12 (iii) other circumstances make an award of sanctions unjust.

13 Fed. R. Civ. P. 37(a)(5)(A) (emphasis added).

14 A party which successfully opposes a discovery motion is also entitled to
15 recover the costs it incurred: “If the motion is denied, ***the court . . . must***, after
16 giving an opportunity to be heard, ***require the movant . . .*** to pay the party . . . who
17 opposed the motion its reasonable expenses incurred in opposing the motion,
18 including attorney’s fees.” Fed. R. Civ. P. 37(a)(5)(B) (emphasis added).

19 Rule 37 also applies to motions for review of a magistrate judge’s discovery
20 order: “Reasonable fees incurred in responding to a Rule 72(a) objection [to the
21 magistrate judge’s discovery ruling] are recoverable under Rule 37(a)(5)(A).”
22 *Marrocco v. Hill*, 291 F.R.D. 586, 590 (D. Nev. 2013) (“the purposes underlying
23 Rule 37(a)’s fee-shifting provision would be thwarted by not awarding attorneys’
24 fees incurred in opposing a Rule 72(a) objection to an order granting a motion to
25 compel”); *see also Blair v. CBE Grp., Inc.*, 2014 WL 4658731, at *2 (S.D. Cal.
26 2014) (“District courts have routinely awarded attorneys’ fees pursuant to Federal
27 Rule of Civil Procedure 37 for fees incurred in responding to a Rule 72(a)
28 objection.”); *MAS, Inc. v. Nocheck, LLC*, 2011 WL 1135367, at *4 (E.D. Mich.
2011) (concluding that fees incurred in responding to a Rule 72(a) objection are
embodied in the term “reasonable expenses incurred in making the motion”).

1 The burden is on the party losing the motion to affirmatively demonstrate
2 that its position was substantially justified or that an award of sanctions would be
3 unjust. *See Lorillard Tobacco Co. v. Elston Self Service Wholesale Groceries, Inc.*,
4 259 F.R.D. 323, 327 (N.D. Ill. 2009). “A request for discovery is ‘substantially
5 justified’ under the rule if reasonable people could differ as to whether the party
6 requested must comply.” Dkt. 227, p. 6, *quoting Reygo Pacific Corp. v. Johnston*
7 *Pump Co.*, 680 F.2d 647, 649 (9th Cir. 1982). “[A] refusal to relinquish an
8 erroneous claim . . . provides no justification, substantial or otherwise, for that
9 claim.” Dkt. 187, p. 3. Unless the losing party can make this showing, or unless
10 the court finds that the movant failed to first make a good faith attempt to obtain the
11 discovery without court action, an award of expenses under Rule 37 is “automatic.”
12 *Lorillard Tobacco Co.*, 259 F.R.D. at 327.

13 As the Supreme Court has recognized, “Rule 37 sanctions must be applied
14 diligently both to penalize those whose conduct may be deemed to warrant such a
15 sanction, and to deter those who might be tempted to such conduct in the absence of
16 such a deterrent.” *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980).
17 In the words of Magistrate Judge Hillman:

18 For the discovery system to function properly, the costs of resisting discovery
19 must be sufficiently great so that the benefits to be gained from sharp or
20 evasive discovery practices are outweighed by the sanctions imposed when
21 those practices are discovered. It is not enough that an offender belatedly
22 comply with its discovery obligations; [i]f the only sanction for failing to
23 comply with the discovery rules is having to comply with the discovery rules
24 if you are caught, the diligent are punished and the less than diligent,
25 rewarded.

26 *Wingnut Films, Ltd. v. Katja Motion Pictures Corp.*, 2007 WL 2758571, *16 (C.D.
27 Cal. 2007) (internal citation, quotation marks omitted); *see also* Fed. R. Civ. P. 37,
28 Adv. Comm. Notes to 1970 Amendment (noting that sanctions under
subdivision (a) are “the most important available sanctions to deter abusive resort to
the judiciary”).

Courts customarily use the lodestar method for determining the amount of attorney's fees to award under Rule 37. *See Morales v. City of San Rafael*, 96 F.3d 359, 363 (9th Cir. 1996) (lodestar method is "customary method of determining fees"); *Pinterest, Inc. v. Pintrips, Inc.*, 2015 WL 154522, at *6 (N.D. Cal. 2015) ("Courts in the Ninth Circuit calculate an award of attorney's fees [under Rule 37] using the lodestar method . . ."). Under the lodestar method, the Court determines the amount of fees based on a reasonable hourly rate multiplied by the number of hours reasonably incurred by the prevailing party. *See id.*

This Court previously awarded Plaintiffs' their reasonable expenses in successfully bringing and prosecuting their Discovery Motion No. 1. In calculating those expenses, the Court averaged the hourly rate of all of Plaintiffs' attorneys who worked on the motion, and determined that a blended hourly rate of \$328 was appropriate. Dkt. 187, p. 4. Plaintiffs have used the same blended rate in calculating their attorney's fees for purposes of this Motion.

2. Defendants' Position

a) Legal Standard on Rule 37

A Rule 37 motion should be filed "without unreasonable delay." *Lancaster v. Independent School Dist. No. 5*, 149 F.3d 1228, 1237 (10th Cir. 1998) (citing *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 (7th Cir. 1994)). The court may consider such a motion untimely if there is unreasonable delay in seeking sanctions. *Brandt*, 30 F.3d at 756. Here, it is Defendants' position that Plaintiffs' instant motion is untimely.

Moreover, Rule 37 sanctions should not be levied if there was "substantial justification" for a party's failure to produce information. Fed. R. Civ. P. 37(c)(1). The party allegedly failing to make a required production bears the burden of establishing substantial justification, but if a reasonable person would be satisfied that the parties could reasonably differ regarding compliance with the disputed discovery request, the test for substantial justification is met. *Ellison v. Windt*, 2001

1 WL 118617, at *2 (M.D. Fla., Jan. 24, 2001) (citation omitted). Even if the court
2 finds that a party did fail to produce required information, sanctions need not be
3 levied if the failure to produce was harmless. Fed. R. Civ. P. 37(c)(1).

4 **b) The Awarding of Attorneys' Fees Are at the Court's**
5 **Discretion**

6 The Court may clearly deny the request for attorneys' fees "if: (i) the movant
7 filed the motion before attempting in good faith to obtain disclosure...without court
8 action; [or] (ii) the opposing party's nondisclosure, response or objection was
9 substantially justified." Fed. R. Civ. P. 37(a)(5)(A)(i) - (ii).

10 Court[s]do[es] not take lightly the imposition of monetary sanctions. *Lee v.*
11 *Walters*, 172 F.R.D. 421, 435 (D. Or. 1997). "Rule 37 sanctions were intended to
12 'punish[] evasion of pretrial discovery.'" *Wanderer v. Johnston*, 910 F.2d 652, 655
13 (9th Cir. 1990) *citing* Maurice Rosenberg, *Sanctions to Effectuate Pretrial*
14 *Discovery*, 58 Colum.L.Rev. 480, 482 (1958). Before awarding such sanctions, the
15 court must make an express finding that the sanctioned party's behavior
16 "constituted or was tantamount to bad faith." *Leon v. IDX Sys. Corp.*, 464 F.3d 951,
17 961 (9th Cir. 2006) *citing Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644,
18 648 (9th Cir.1997). "The bad faith requirement ensures that the district court's
19 exercise of its *broad power* is properly restrained." *Leon*, 464 F.3d at 961.

20 Additionally, if the non-moving party can demonstrate a good faith effort to
21 produce discovery, courts in several circuits have refused to levy Rule 37 sanctions
22 such as attorneys' fees against that non-moving party. *See Garrison v. Warner*
23 *Bros. Pictures*, 226 F.2d 354, 356 (9th Cir. 1955); *see also Cullins v. Heckler*, 108
24 F.R.D. 172, 176-177 (S.D.N.Y. 1985). In addition, courts in the Central District
25 have refused to award attorneys' fees even in cases where the moving party
26 prevailed on the underlying motion to compel because the court also held that the
27 moving party "did not attempt in good faith to obtain the disclosure without court
28 action." *Bd. of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253

1 F.R.D. 521, 523 (C.D. Cal. 2008).

2 **c) Plaintiffs Have Not Been Prejudiced**

3 In determining whether sanctions are appropriate, this Court considers the
4 degree to which the party seeking sanctions has been prejudiced. *Beard Research,*
5 *Inc. v. Kates*, 981 A.2d 1175, 1189-90 (Del. Ch. 2009) (“The Court has wide
6 latitude to fashion an appropriate remedy, but the remedy must be tailored to the
7 degree of culpability of the spoliator *and the prejudice suffered by the complaining*
8 *party.*”) (emphasis added). There has been no prejudice here. Discovery remains
9 open in this matter by virtue of the Court granting the parties' joint stipulation to
10 continue the trial date and all pre-trial deadlines. (See Dkt Nos., 228 and 229.)
11 Plaintiffs still have the opportunity to depose Defendants concerning the responses
12 to written interrogatory propounded by Plaintiffs up through this point of the
13 litigation. Therefore, Plaintiffs thus cannot be heard to complain that they suffered
14 prejudice in developing their case as discovery remains open.

15 **d) Defendants Have Complied With All Discovery Orders For**
16 **Which Sanctions Are Sought**

17 As noted by the Seventh Circuit, Rule 37(b)(2)'s “plain language limits its
18 applicability to situations where a court order has been violated. Moreover, the case
19 law reveals that Rule 37(b)(2) has been invoked only against parties who have
20 disobeyed a discovery ruling of some sort.” *Brandt v. Vulcan, Inc.*, 30 F.3d 752,
21 756 (7th Cir. 1992); see also *Daval Steel Products v. M/V Fakredine*, 951 F.2d
22 1357, 1363 (2nd Cir. 1991) (Discovery sanctions reversed against a defendant
23 because no discovery order had been directed against that defendant). “Sanctions
24 issued under Rule 37 are designed to... obtain[] compliance with a specific
25 discovery order...” *Baker v. Ace Advertisers' Service, Inc.*, 153 F.R.D. 38, 40
26 (S.D.N.Y. 1992) (emphasis added); see also *EEOC v. Troy State University*, 693
27 F.2d 1353, 1357 (11th Cir. 1982) (noting that a dismissal sanction was not
28 warranted where “the court never issued a specific written order delineating

precisely” what documents the party was required to produce); cf. DiGregorio v. First Rediscount Corp., 506 F.2d 781, 788 (3d Cir. 1974) (affirming sanctions where party violated “a specific court order”).

e) Defendants Properly Objected to Plaintiffs' Discovery Request

Defendants properly objected to Plaintiffs interrogatories and requests for production that are the subject of the instant motion. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure. Fed. R. Civ. P. 33(b)(4). When an objection is made to part of an interrogatory, the remainder of the interrogatory must be answered, as was done here. Fed.R.Civ.P. 33(b)(3). All grounds for objection for an interrogatory must be stated with specificity, as Defendants have done here. Fed.R.Civ.P. 33(b)(4).

B. Defendants' Motion for Review of the Court's Order Granting Plaintiffs' Discovery Motion No. 1.

1. Plaintiffs' Position.

After Plaintiffs prevailed on Discovery Motion No. 1, GK moved for district court review of this Court's order, causing Plaintiffs to incur additional expenses. Judge Fitzgerald denied the motion for review in its entirety.⁴

a) This Court's Discovery Ruling Granting Plaintiffs' Discovery Motion No. 1 and GK's Motion For Review of the Discovery Order.

On June 30, 2015, Plaintiffs moved to compel supplemental responses and the production of documents in response to 27 document requests. Dkt. 72-1, p. 2. The requests sought GK's internal accounting records, bank records, internal and external communications and correspondence related to the settlement of the

⁴ To be clear, Plaintiffs are not seeking expenses related to their successful prosecution of Discovery Motion No. 1 before this Court; Plaintiffs were already awarded those fees by the Court. *See* Dkt. 187.

1 HRT Litigation, and to the receipt, retention, allocation and disposition of the
2 HRT settlement funds. *Id.*

3 GK's original responses consisted of ten boilerplate objections repeated for
4 each of the requests: (1) vague and ambiguous; (2) equally available information;
5 (3) information is already in Plaintiffs' possession; (4) not reasonably limited in
6 time or scope; (5) not calculated to lead to admissible evidence; (6) calls for a legal
7 conclusion; (7) attorney work product; (8) cumulative; (9) intended to harass; and
8 (10) attorney client privilege. Dkt. 72-1, p. 17. None of the objections were stated
9 with specificity. *Id.*

10 In addition, each response included a statement that GK "will produce a copy
11 of any responsive documents in its possession, custody, or control that are not
12 privileged." *Id.* (emphasis added). Ultimately, however, GK produced a mere
13 28 pages; numerous categories of documents were not produced; none of GK's
14 responses identified any privileged documents; and GK did not produce a privilege
15 log, despite requests that it do so. Dkt. 72-1, p. 2.

16 Moreover, GK's objections had been overruled in prior motions. In
17 particular, the Court addressed in detail GK's relevance, privilege, overbreadth and
18 other objections when it earlier denied GK's motion to quash the Torrey Pines
19 Bank subpoena. *See discussion infra at § II.F.* In fact, at the hearing on Discovery
20 Motion No. 1, this Court emphasized the repetitive nature of GK's objections:

21 [F]irst of all, it looks to me as there really – there – no issues have
22 been raised here that haven't previously been raised and rejected by
23 the Court in connection with why the documents shouldn't be
24 produced. The Defendants seem to persist in their contention that
25 they don't agree with the Plaintiffs' theory and so, therefore, they
26 don't have to give them any documents. And that's just not the way
27 discovery works.

28 Friedberg Decl., ¶ 5; Ex. K (July 21, 2015 Hr. Tr.), p. 2:11-19. The Court also
indicated that it intended to award attorney's fees to Plaintiffs, again noting "that it
seems to me almost every single issue involved in this motion I previously ruled

1 upon on other motions. I don't want to rule upon the same issue again." *Id.*,
2 p. 20:14-17. GK's counsel did not assert that there were any new issues or
3 objections raised in its opposition. *See id.*

4 This Court granted the motion in its entirety. Dkt. 94 (Civil Minutes re
5 Plaintiffs Motion to Compel No. 1), attached as Exhibit A to the Friedberg
6 Declaration. The ruling stated, in relevant part:

7 Plaintiffs' motion to compel is GRANTED. Defendant Girardi Keese
8 is ordered to serve supplemental responses without objection to all
9 document requests and produce all responsive documents within 2
10 weeks.

11 *Id.*

12 On July 21, 2015, GK moved for review of this Court's order, contending
13 that the order was "clearly erroneous and contrary to law" and that it "failed to
14 address specific objections." Dkt. 97, p. i. GK contended that the order did not
15 articulate findings or a rational for its decision, *id.*, p. 5; improperly relied on prior
16 discovery rulings, *id.* p. 6; improperly compelled production, *id.*, p. 8; and
17 improperly ordered production within two weeks, *id.*, p. 9.

18 Plaintiffs opposed on the grounds that (1) Defendants' did not meet and
19 confer in compliance with the Local Rules; (2) GK's objections were overruled in a
20 prior motion, in which many of the objections, including privilege and relevance,
21 were addressed in detail; (3) the Court's rulings were correct under applicable law;
22 and (4) the Court was not required to provide a detailed explanation for its decision.
Dkt. 105, pp. 1-2.

23 **b) The District Court's Ruling Denying GK's Motion**
24 **for Review.**

25 The District Court held a hearing on the motion on September 14, 2015.
26 After hearing argument, it admonished GK to produce the requested documents and
27 to stop the discovery gamesmanship:

1 Mr. Baker, at some point in this case, there has to be an accounting of
2 how much money went in and how much money went out. I mean,
3 that's the entire purpose of the lawsuit.

4 Friedberg Decl., ¶ 6; Ex. L (Sept. 14, 2015 Hr. Tr.), p. 10. The Court further
5 warned that "there has to be a drop-dead date where somebody on behalf of the
6 defendant says, under penalty of perjury, that all of the documents that are
7 responsive have been produced, and if it turns out that that is not [the] case, we'll
8 suffer the consequences." *Id.*, p. 11.

9 The Court issued an 11-page order denying Defendants' motion in its
10 entirety. *See* Dkt. 127, p. 1, attached as Exhibit H to the Friedberg Declaration.
11 The order addressed GK's violation of the local rules, noting that "any future
12 failure to engage in the required meet-an-confer process will result in appropriate
13 sanctions." *Id.*, p. 7. The Court also rejected GK's substantive arguments, finding
14 that "[t]he Magistrate Judge, in fact, *had* considered the parties' contentions before
15 concisely articulating the grounds for his ruling in the Bench Order." *Id.*, p. 8
16 (original emphasis). The Court then overruled each and every objection raised by
17 GK, finding the discovery order to be "without . . . any error, let alone a clear one."
18 Dkt. 127, p. 8.⁵

19 c) **None of the Exceptions to Rule 37 Apply.**

20 (i) *Plaintiffs Met and Conferred in Good Faith.*

21 GK failed to timely meet and confer as required by Local Rule 7-3, which
22 requires a meeting at least seven days before a motion is filed. As a result, the
23 parties met and conferred on the day on which Defendants filed their Motion,
24 Dkt. 127, p. 7, leading Judge Fitzgerald to admonish Defendants that "any future
25

26 ⁵ The District Court repeatedly used phrases such as "already addressed," "ruled
27 upon the same issue again," "choose not to revisit," "already considered," and
28 "resolved a similar dispute in the past" to address GK's arguments. *Id.*, pp. 8-10.

1 failure to engage in the required meet-and-confer process will result in appropriate
2 sanctions.” *Id.*

3 (ii) *GK’s Objections Were Not Substantially Justified.*

4 This Court had already determined that Defendants lacked substantial
5 justification in opposing the underlying discovery motion. Dkt. 187. Defendants’
6 burden on the motion for review was even higher, as they had to show clear error.
7 As the District Court determined, GK’s position lacked substantial justification.
8 *See* Friedberg Decl., Ex. H (Dkt. 127), p. 8 (“Magistrate Judge addressed these
9 arguments without committing any error, yet alone a clear one”).

10 (iii) *No Circumstances Make a Sanctions Award Unjust.*

11 There are no circumstances that would make an award of monetary sanctions
12 unjust. To the contrary, Defendants’ pattern and practice of discovery abuses
13 further support an award of sanctions.

14 d) **The Court Should Award Plaintiffs Sanctions of \$14,924.00.**

15 Plaintiffs’ counsel spent over 45.5 hours litigating the motion for review.
16 Friedberg Decl., ¶ 19.⁶ This included preparing and filing a 19-page opposition and
17 a 12-page declaration with 155 pages of exhibits, and preparing for and appearing
18 and presenting argument at the hearing on the motion for review. *See* Dkts. 105,
19 105-1, 105-2. These hours are detailed in the timesheets attached as **Exhibit R** to
20 the concurrently filed Friedberg Declaration. Applying the \$328 blended rate,
21 Plaintiffs are entitled to reasonable expenses of \$14,924.00. *Id.*

22
23
24
25 ⁶ The figures presented in this Motion do not reflect all time actually incurred as
26 time was written off where appropriate. Friedberg Decl., ¶¶ 14-16. Moreover,
27 where time incurred related to more than one discovery motion, Plaintiffs included
28 that time in its calculation of the lowest numbered-motion to avoid “double
counting” the hours worked. *Id.*

1 **2. Defendants' Position.**

2 **a) Defendants Complied with the Court's Order Granting**
3 **Plaintiffs' Discovery Motion No. 1.**

4 Sanctions under discovery rules are available if, and only if, a party violates a
5 discovery order; absence of order precludes sanctions. See *Brandt v. Vulcon, Inc.*,
6 30 F. 3d 752 (7th Cir. 1994, rehearing and suggestion for rehearing en bane
7 denied). The Defendants did comply with the Court's order Granting Plaintiffs'
8 Discovery Motion No. 1, entered on July 21, 2015. (Dkt No. 94.) On August 4,
9 2015, Defendants served "GK's Supplemental Response to Plaintiffs' RFP Set 1,"
10 which included the production of nearly 4,000 documents, in response to the
11 Court's July 21, 2015 Order. Defendants' served the foregoing responses before the
12 Court heard Defendants' Motion for Review on September 14, 2015 and denied it
13 on September 17, 2015. (See Dkt Nos. 114 and 127.) Following the Court's order
14 denying Defendants' Motion for Review, Plaintiffs served "GK's Further
15 Supplemental Response to Plaintiffs' RFP, Set 1), on September 28, 2015,
16 consisting of nearly 22,000 pages of responsive documents in Defendants'
17 possession, custody, and/or control.

18 **b) Plaintiffs' Delay in Seeking Discovery Sanctions is**
19 **Unreasonable**

20 A motion to compel and for sanctions must be brought within a reasonable
21 time after the alleged discovery violation. *Brandt v. Vulcan*, at 756. Failure to
22 respond within a reasonable time results in waiver. *Gault v. Nabisco Biscuit Co.*,
23 184 F.R.D. 620, 622 (D. Nev. 1999) (motion to compel further responses denied as
24 untimely when filed 136 days after receipt of the allegedly deficient responses
25 where there was no showing that delay was caused by matters outside counsel's
26 control).

27 Here, Plaintiffs bring this motion requesting monetary sanctions without
28 providing any explanation, let alone a reasonable one, for their delay in bringing

1 said motion. As such, it should be found that Plaintiffs' waived their ability to
2 impose sanctions as a result of waiting [# of days/months between] between the
3 time the Court entered its order denying Defendants' Motion for Review and the
4 filing of the instant Motion. Additionally, Plaintiffs bring this motion after the trial
5 date and all related dates have been continued two times. Currently, the operative
6 non-expert cut-off date is May 27, 2016. This new deadline is the result of the
7 Court's order of May 5, 2016 granting the parties' request to continue all pre-trial
8 deadlines. (*See* Stipulation, Dkt. No. 228; *See* Order Dkt. No. 229).

9 **c) Sanctions are not Warranted under Fed. R. Civ. P. 37.**

10 Federal Rule of Civil Procedure 37(a)(5)(A) provides that, even if a
11 discovery motion is granted, the court should not impose sanctions on the opposing
12 party if: the opposing party's nondisclosure, response, or objection was substantially
13 justified; or other circumstances make an award of expenses unjust. Fed. R. Civ.
14 P. 37(a)(5)(A). Here, Defendants' responses to the Interrogatories were
15 substantially justified.

16 Resisting discovery is "substantially justified when there is a "genuine
17 dispute" as to whether the discovery request was proper. *See* Fed. R. Civ. P. 37(a),
18 Advisory Committee Notes, 1970 Amendment. As the Supreme Court articulated
19 in *Pierce v. Underwood*, 487 U.S. 552 (1988):

20 "[T]he test for avoiding the imposition of attorney's fees for resisting
21 discovery in district court is whether the resistance was "substantially
22 justified." To our knowledge, that has never been described as
23 meaning "justified to a high degree," but rather has been said to be
24 satisfied if there is a "genuine dispute," or "if reasonable people could
25 differ as to [the appropriateness of the contested action]."

26 *Id.* at 565(internal citations omitted). The Court further explained that "the word
27 'substantially,' the one most naturally conveyed by the phrase before us here is not
28 'justified to a high degree,'" but rather "'justified in substance or in the main'—that
is, justified to a degree that could satisfy a reasonable person." *Id.*; *see also United*
States v. Yoffe, 775 F.2d 447, 449-50 (1st Cir. 1985).

Here, it does not defy logic to conclude that reasonable people could differ as to the dispute concerning Defendants' allegedly deficient responses to Plaintiffs' 27 requests for production that were the subject of Plaintiffs Motion to Compel No. 1. Furthermore, Sanctions under discovery rules are available if, and only if, a party violates a discovery order; absence of order precludes sanctions. See *Brandt v. Vulcon, Inc.*, 30 F. 3d 752 (7th Cir. 1994, rehearing and suggestion for rehearing en bane denied). To reiterate, Defendant, in compliance with the Court's order granting Plaintiffs' Motion to Compel No. 1 (Dkt. No. 94) and the Court's order denying Defendants' Motion for Review of the Court Order Granting Motion to Compel No. 1 (Dkt. 127) GK's Supplemental Responses on August 8, 2014 and GK's Further Supplemental responses on September 28, 2015. The Defendants did not violate any discovery order. Accordingly, sanctions are not warranted.

C. Plaintiffs' Discovery Motion No. 2.

1. Plaintiffs' Position.

Discovery Motion No. 2 sought to compel GK to respond to Plaintiffs' Interrogatories, Set Two. GK waived its objections by failing to serve timely responses, then belatedly objected and refused to answer the interrogatories. This Court granted the motion in its entirety, finding GK's objections to be "incomprehensible" and "factually incorrect," and waived in any event.

a) Plaintiffs' Discovery Request and GK's Objections.

On June 4, 2015, Plaintiffs served Requests for Admissions (the "RFAs"). Dkt. 110-1, p. 2. At the same time, Plaintiffs served Interrogatories, Set Two. The interrogatories required that for each RFA that GK denied, GK describe the facts that it contended supported the denial, and identify the person(s) with knowledge of those acts and the document(s) supporting the denial. The purpose of the interrogatory was to determine the factual issues remaining in dispute, what additional discovery was needed and what evidence Defendants might present to support their position.

1 GK denied 55 of the RFAs. GK's interrogatory responses were due by
2 July 6, 2015, a week before the discovery cut-off date, which was then July 13,
3 2015. GK responded more than a month late, on August 14, 2015, having neither
4 requested an extension of the deadline nor provided any explanation for its late
5 responses. *See id.* When GK finally responded, it did not provide any substantive
6 answers. Instead, its responses consisted entirely of the following single objection:

7 Defendant objects on the grounds that the said interrogatories are to
8 be due July 10, 2015. However the response is due for the pending
9 Interrogatories was due [*sic*] on July 20, 2015 and thus was past the
10 discovery cut-off. Since the Court has extended the discovery cut-off,
11 Responding party submits the response. Furthermore, pursuant to
12 F.R.C.P. 33, a party may serve on any other party "no more than 25
13 written interrogatories, including all discrete subparts." The pending
14 Interrogatories far exceed this limitation. Plaintiff also served
15 Interrogatories set three, which include Interrogatory No. 17 has 8
16 subparts along [*sic*], Interrogatory 18 included 34 subparts. As a
17 result this question seeks four 4 [*sic*] subparts as it relates to 133
18 separate requests for admissions. Girardi Keese are [*sic*] willing to
19 cooperate to narrow the requested information if an agreement is
20 offered by Plaintiffs.

21 Dkt. 106-1, p. 8.

22 **b) The Court's Ruling Granting Plaintiffs' Motion to Compel.**

23 Plaintiffs moved to compel substantive answers and requested reasonable
24 expenses. Dkt. 106-1, p. 13. The Court ruled without the need for a hearing. The
25 Court granted the motion in its entirety. Friedberg Decl., ¶ 3; Ex. B (Order
26 Granting Plaintiffs Motion to Compel Answers to Plaintiffs' Interrogatories, Set
27 Two, Dkt. 128). The Court described GK's first objection as "incomprehensible."
28 *Id.*, p. 2. The Court found the second objection to be "factually incorrect" because
the responses had been due before the discovery cut-off date. *Id.* Finally, the Court
found that GK had waived its objections:

Plaintiff correctly asserts that by responding late to the interrogatory,
defendant waived its objections. Defendant has provided no excuse
whatsoever for failing to timely respond to the interrogatory or at least
request an extension of time within which to do so.

1 *Id.*, p. 2.⁷

2 c) **None of the Exceptions to Rule 37 Apply.**

3 (i) *Plaintiffs Met and Conferred in Good Faith Before*
4 *Filing Their Motion.*

5 On July 22, 2015, Plaintiffs sent a meet and confer letter stating that no
6 responses or objections had been received and requesting that the parties meet and
7 confer in person. Dkt. 106-2, ¶ 46, Ex. O. On July 30, 2015, GK promised to
8 promptly provide a substantive response to the letter by August 3, 2015, but failed
9 to respond as promised. *Id.*, ¶¶ 47-48, Ex. P. Accordingly, Plaintiffs prepared a
10 Joint Stipulation in support of a motion to compel substantive interrogatory
11 responses, which it sent on August 13, 2015. *Id.*, ¶ 49, Ex. Q (original joint
12 stipulation and cover letter). The next day, defense counsel informed Plaintiffs that
13 GK had served responses the night before via mail. *Id.*, ¶ 50, Ex. R.

14 On August 17, 2015, Plaintiffs initiated a second round of telephonic meet
15 and confer discussions. *Id.*, ¶ 54. On August 20, 2015, GK confirmed that it would
16 not provide further responses to the interrogatories, requiring Plaintiffs to file their
17 Discovery Motion No. 2. *Id.*

18 (ii) *GK's Objections Were Not Substantially Justified.*

19 GK's objections lacked justification. The Court found that they were
20 "incomprehensible" and "factually incorrect," and waived due to GK's failure
21 provide a timely response. Friedberg Decl., Ex. B (Dkt. 128), p. 2. *See* Fed. R.
22 Civ. P. 33(b)(4) ("Any ground not stated in a timely objection is waived unless the
23 court, for good cause, excuses the failure.").

27 ⁷ The Court's order did not address Plaintiffs' request for monetary sanctions. *See*
28 *id.*

(iii) *No Circumstances Make a Sanctions Award Unjust.*

There are no circumstances that would make an award of monetary sanctions unjust. To the contrary, as Judge Fitzgerald found in ruling on Plaintiffs' *Ex Parte* Application to Continue Trial Date:

Ever since discovery began, Plaintiffs have attempted to obtain documents directly relevant to their claims. They have engaged in a remarkable number of meet-and-confer communications in order to persuade Defendants to either respond or supplement responses to legitimate discovery requests. Defendants, however, refused to provide the vast majority of the relevant information, at times waiting as long as a month past the response deadline without providing any explanation for the delay. On two occasions Defendants waited to provide delinquent responses until after Plaintiffs served the Joint Stipulation, thereby requiring Plaintiffs to begin the meet-and-confer process anew and prepare a revised motion to compel . . . [¶]

Indeed, both the Magistrate Judge and this Court have recognized that the discovery delays were due to Defendants' intransience.

Friedberg Decl., ¶ 9; Ex. O (Oct. 10, 2015 Order Granting in Part Plaintiffs' *Ex Parte* Application to Continue Trial Date, Dkt. 160), pp. 9-10 (citations omitted, emphasis added).

d) The Court Should Award Plaintiffs Sanctions of \$18,171.20.

Plaintiffs' counsel spent over 55.4 hours litigating this motion. Friedberg Decl., ¶ 20. That included drafting a two-page meet and confer letter; drafting and emailing an initial Joint Stipulation that became obsolete when Defendants belatedly served objections to the interrogatories; further meet and confer efforts following GK's untimely responses; then preparing and filing a 13-page Joint Stipulation, and a 13-page declaration with 150 pages of exhibits; and preparing and filing a 5-page Supplemental Memorandum. *See* Dkts. 106-1, 106-2, 110. These hours are detailed in the timesheets attached as **Exhibit S** to the Friedberg Declaration. Based on a blended rate of \$328 per hour, Plaintiffs are entitled to reasonable expenses of \$18,171.20.

2. *Defendants' Position.*

On June 4, 2015, Plaintiffs served Requests for Admissions and Interrogatories, Set

Two (the “Interrogatories”). The Interrogatories essentially asked Defendants to “prove the negative” by requiring Defendants to specify all facts, documents, and witnesses that support the denial of a statement of allegation of fact in Plaintiffs’ Requests for Admission. As a result, the Interrogatories far exceeded the 25-interrogatory limit under Fed. R. Civ. P. 33(a)(1). Despite this, Defendants served their responses to the Interrogatories following a brief delay—during which a motion to continue the discovery cut-off was concurrently pending—caused by an unforeseen calendaring error concerning the operative discovery cut-off date. After receiving Defendants’ responses to the Interrogatories, Plaintiffs nonetheless filed a motion to compel further responses to over 25 interrogatories, in violation of Fed. R. Civ. P. Rule 33(a)(1). Sanctioning Defendants would bestow a windfall upon Plaintiffs, given their own discovery transgressions. Accordingly, Plaintiffs sanctions request should be denied.

a) **Plaintiffs Abused the Discovery Process by Propounding Interrogatories in Excess of the 25-Interrogatory Limit Under Fed. R. Civ. P. 33(a)(1).**

With respect to the Interrogatories, and Plaintiffs’ related Discovery Motion No. 2, Defendants did not dispute that “any party may serve upon any other party written interrogatories not exceeding 25 in number including all discrete subparts.” Fed. R. Civ. P. 33(a)(1). Nor does Defendant dispute that discrete subparts “are to be counted as one interrogatory...if they are logically related or factually subsumed within and necessarily related to the primary question.” *Kendall v. Ges Exposition Services, Inc.*, 174 F.R.D. 684, 685 (D.Nev. 1997). Rather, the issue was whether the Interrogatories exceeded the 25-interrogatory limit under Fed. R. Civ. P. 33(a)(1) by asking “one” interrogatory that requires detailed information concerning all facts, documents, and witnesses pertaining to *fifty-five* denied requests for admission.

1 The principal case addressing that issue repudiated the strategy used by
2 Plaintiffs, labeling it an “abuse of the discovery process.” *Safeco of America v.*
3 *Rawstron*, 181 F.R.D. 441, 445-47. (C.D. Cal. 1998); *see also Makaeff v. Trump*
4 *University, LLC*, No. 10-CV-0940-GPC (WVG), 2014 WL 3490356, at *4-5 (citing
5 *Safeco*); *In re Olympia Holding Corp.*, 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995).
6 In denying the motion to compel at issue in *Safeco*, this Court explained that an
7 interrogatory asking the responding party to provide a basis for denials counts not
8 as one interrogatory, but *as the number of explained denials*. *Id.* at 446. Indeed,
9 holding otherwise would permit a propounding party to perform an end run around
10 the numerical limit under Rule 33(a)(1):

11 Allowing service of an interrogatory which requests disclosure of all of
12 the information on which the denials of each of 50 requests for
13 admission were based, however, essentially transforms each request for
14 admission into an interrogatory. This is not the purpose requests for
15 admission were intended to serve, and because Rule 36 imposes no
16 numerical limit on the number of requests for admission that may be
17 served, condoning such a practice would circumvent the numerical limit
18 contained in Rule 33(a).

19 *Id.*

20 Logically the drafters of Rule 33 did not intend to create a loophole to that
21 limit by allowing requests for admission to act as interrogatories. However,
22 Plaintiffs did not cite a single court which has authorized this loophole. Given the
23 extensive law on this topic, Defendants believed in good faith that Plaintiffs’
24 attempt to circumvent Rule 33(a) constituted an abuse of the discovery process and
25 objected accordingly. *See In re. Olympia Holding Corp.*, 189 B.R. at 853
26 (“Utilizing interrogatories disguised as requests for admissions in an attempt to
27 circumvent a local rule limiting the number of interrogatories is an abuse of the
28 discovery process.” (Citation omitted)).

b) Sanctions are not Warranted under Fed. R. Civ. P. 37.

Federal Rule of Civil Procedure 37(a)(5)(A) provides that, even if a

1 discovery motion is granted, the court should not impose sanctions on the opposing
2 party if: the opposing party's nondisclosure, response, or objection was substantially
3 justified; or other circumstances make an award of expenses unjust. Fed. R. Civ.
4 P. 37(a)(5)(A). Here, Defendants' responses to the Interrogatories were
5 substantially justified.

6 Resisting discovery is "substantially justified when there is a "genuine
7 dispute" as to whether the discovery request was proper. *See* Fed. R. Civ. P. 37(a),
8 Advisory Committee Notes, 1970 Amendment. As the Supreme Court articulated
9 in *Pierce v. Underwood*, 487 U.S. 552 (1988):

10 "[T]he test for avoiding the imposition of attorney's fees for resisting
11 discovery in district court is whether the resistance was "substantially
12 justified." To our knowledge, that has never been described as
13 meaning "justified to a high degree," but rather has been said to be
14 satisfied if there is a "genuine dispute," or "if reasonable people could
15 differ as to [the appropriateness of the contested action]."

16 Id. at 565(internal citations omitted). The Court further explained that "the word
17 'substantially,' the one most naturally conveyed by the phrase before us here is not
18 'justified to a high degree,'" but rather "'justified in substance or in the main'—that
19 is, justified to a degree that could satisfy a reasonable person." Id.; *see also United*
20 *States v. Yoffe*, 775 F.2d 447, 449-50 (1st Cir. 1985).

21 Here, whether the Interrogatories constituted an abuse of the discovery
22 process was a "genuine dispute." And "reasonable people" could differ as to the
23 appropriateness of Defendants' conduct in objecting to the Interrogatories, which
24 indisputably violated Rule 33(a)(1), irrespective of whether Defendants' responses
25 were timely. *See* Fed. R. Civ. P. 33(a)(1) (providing that "any party may serve
26 upon any other party written interrogatories **not exceeding 25** in number including
27 all discrete subparts." (Emphasis added)); *In re. Olympia Holding Corp.*, 189 B.R.
28 at 853 ("Utilizing interrogatories disguised as requests for admissions in an attempt
to circumvent a local rule limiting the number of interrogatories is an abuse of the
discovery process." (citation omitted)); *see, e.g., Safeco*, 181 F.R.D. at 441
("Allowing service of an interrogatory which requests disclosure of all of the

1 information on which the denials of each of 50 requests for admission were based,
2 however, essentially transforms each request for admission into an interrogatory.”).

3 **D. Plaintiffs’ Discovery Motion No. 3.**

4 **1. Plaintiffs’ Position.**

5 Plaintiffs’ Discovery Motion No. 3 sought to compel GK to respond to
6 Plaintiffs’ Interrogatories, Set Three. GK again failed to provide timely responses,
7 and served responses after receiving Plaintiffs’ portion of a Joint Stipulation. The
8 same objections had already been overruled by the Court and found to have been
9 waived in granting Plaintiffs’ Discovery Motion No. 2. This Court granted the
10 motion in its entirety.

11 **a) Plaintiffs’ Discovery Request and GK’s Objections.**

12 On June 11, 2015, Plaintiffs served GK with Plaintiffs’ Interrogatories,
13 Set Three. Dkt. 109-1, p. 2. The interrogatories sought information relating to:
14 (1) the amount of time specific GK attorneys spent working on the HRT Litigation;
15 (2) the work performed by specific non-attorneys on the HRT Litigation who were
16 listed on GK’s “Case Cost Report”; (3) the amount each such non-attorney was
17 paid and whether they were paid from the aggregate settlement funds; (4) travel by
18 GK attorneys purportedly for the HRT Litigation; and (5) the identification of any
19 documents that would substantiate that such travel occurred and was, in fact, related
20 to the HRT Litigation. *Id.* The information sought by these interrogatories was
21 important because GK had charged the HRT Claimants \$6.8 million in attorney’s
22 fees, even though it did not have a written fee agreement, and over \$850,000 in
23 costs, including travel expenses that were unsubstantiated.

24 GK again failed to provide timely responses. This time, GK did not respond
25 to the interrogatories until August 13, 2015, more than a month after the deadline to
26 respond had passed. Dkt. 109-1, p. 3. As before, GK had not requested an
27 extension of the deadline or provided any explanation for not timely responding.

28 *See id.*

1 Once again, GK's belated responses consisted entirely of objections and not a
2 single substantive answer. GK again objected on the grounds that: (i) "said
3 interrogatories are to be due July 10, 2015"; (ii) the "response is due for the
4 pending Interrogatories was due [sic] on July 20, 2015 and thus was past the
5 discovery cut-off"; and (iii) due to subparts, the "pending Interrogatories far exceed
6 [the 25-interrogatory] limitation" under the Federal Rules. *Id.*, p. 8, 13, 15, 17, 19,
7 21. In response to certain interrogatories, GK also indicated that it "will produce"
8 unspecified documents from which the answer may be found. *See id.*

9 On September 28, 2015, the day before the hearing on the motion,
10 Defendants produced approximately 20,000 pages of documents (most of which
11 were non-responsive to the interrogatories). Friedberg Decl., ¶ 8; Ex. M (Sept. 29,
12 2016 Hr. Tr.), p. 7:1-16.

13 **b) The Court's Ruling Granting Plaintiffs' Motion to Compel.**

14 Plaintiffs moved to compel substantive answers and requested reasonable
15 expenses. Dkt. 109-1, p. 23. The hearing on the motion began with the following
16 question from the Court:

17 **COURT:** I previously had a motion where . . . the
18 claim of waiver came up, and I wanted to know is there
19 anything additional here with respect to why I shouldn't just go
ahead and say that you had waived your objections?

20 **[DEFENDANTS' COUNSEL]:** *No, Your Honor. . . . I*
21 *think the argument is the same.*

22 Friedberg Decl., ¶ 8; Ex. M (Sept. 29, 2016 Hr. Tr.), p. 3 (emphasis added).

23 The Court granted the Motion. *See* Friedberg Decl., ¶ 3; Ex. C (Order
24 Granting Plaintiffs' Discovery Motion No. 3, Dkt. 169). The Court ordered GK to
25 respond to each interrogatory, and either provide each category of information
26 requested or confirm that all documents necessary to provide the information have
27 been produced and identify the documents by Bates number. *Id.*, pp. 1-2.⁸

28 ⁸ The Court deferred ruling on Plaintiffs' request for monetary sanctions. *Id.*, p. 2.

1 c) **None of the Exceptions to Rule 37 Apply.**

2 (i) *Plaintiffs Met and Conferred in Good Faith Before*
3 *Filing Their Motion.*

4 Following Defendants' failure to respond by the deadline, Plaintiffs sent a
5 meet and confer letter and requested that the parties meet and confer in person.
6 Dkt. 109-2, ¶ 45, Ex. N. Defendants promised to reply promptly and substantively
7 to the letter, but did not. *Id.*, ¶ 46, Ex. O. Plaintiffs subsequently sent Defendants
8 two fully-drafted Joint Stipulations regarding Discovery Motion Nos. 2 and 4. *Id.*,
9 ¶¶ 47-48. The following day, GK responded that they had served responses to this
10 discovery (and the other discovery addressed in the Joint Stipulations) the night
11 before via mail. *Id.*

12 The parties then engaged in a second round of meet-and-confer discussions
13 that covered numerous discovery issues, including GK's responses to these
14 interrogatories. *Id.*, ¶ 51. Ultimately, GK refused to provide further responses to
15 the interrogatories, standing on its late objections. *Id.*, Ex. R.

16 (ii) *GK's Objections Were Not Substantially Justified.*

17 This motion marked the third time the Court was asked to rule upon
18 objections that GK had clearly waived. As Defendants' counsel admitted: "the
19 arguments are the same." Friedberg Decl., Ex. M, p. 3 Moreover, the objections
20 asserted had already been found "incomprehensible" and "factually incorrect."
21 GK's continued reliance on their previously rejected objections lacked any
22 substantial justification. *Id.*, Ex. B, p. 2.

23 (iii) *No Circumstances Make a Sanctions Award Unjust.*

24 There are no circumstances that would make an award of monetary sanctions
25 unjust. To the contrary, Defendants' pattern and practice of discovery abuses
26 further supports the award of sanctions.

1 **d) The Court Should Award Plaintiffs Sanctions of \$14,792.80.**

2 Plaintiffs' counsel spent over 45.1 hours litigating this motion. Friedberg
3 Decl., ¶ 21. This time consisted of preparing, exchanging and filing a Notice of
4 Motion, a 24-page joint stipulation, and a 13-page declaration with 88 pages of
5 exhibits; preparing and filing a 5-page Supplemental Memorandum; and preparing
6 for and appearing and presenting argument at the hearing on the motion. *See*
7 Dkts. 109-1, 109-2, 121. These hours are detailed in the timesheets attached as
8 **Exhibit T** to the Friedberg Declaration. Applying the \$328 blended rate, Plaintiffs
9 are entitled to reasonable expenses of \$14,792.80. *Id.*

10 **2. *Defendants' Position.***

11 **a) Sanctions are not Warranted because Defendants'**
12 **Responses were Substantially Justified.**

13 Like Plaintiff's Interrogatories, Set No. 2, Plaintiffs' Interrogatories Set No. 3
14 contained more than 25 interrogatories in violation of Fed. R. Civ. P. 33(a)(1).

15 Moreover, Defendants were served with the Interrogatories while a motion to
16 continue the discovery cut-off date was concurrently pending. Once discovery was
17 extended, however, Defendants promptly served the Interrogatories on August 12,
18 2015. Accordingly, the Court was not required to issue an order compelling
19 Defendant to provide responses to the Interrogatories, as Plaintiffs were in
20 possession of Defendants' responses before filing Discovery Motion No. 3. In
21 addition, Plaintiffs possessed an alternative remedy to filing that Motion. As a
22 result, the Court was not required to grant it. *See Superior Commc'ns v.*
23 *Earhugger, Inc.*, 257 F.R.D. 215, 218 (C.D. Cal. 2009) ("Since granting plaintiff's
24 motion to compel responses to the interrogatories, even in part, would exceed 25
25 interrogatories, the Court will deny without prejudice plaintiff's motion to compel
26 responses...and afford plaintiff the opportunity to prioritize its inquiries and
27 determine which interrogatories to again submit to defendant."). There was ample
28 time for Plaintiffs to revise the Interrogatories.

Moreover, Defendant had good cause for not timely objecting to the Interrogatories, and thus, Defendant did not waive any objections it may have had. *See* Fed. R. Civ. P. 33(b)(4). Here, Defendant had a good faith belief that the discovery and motion cutoff dates were quickly approaching and wanted to ensure that all necessary discovery and motions were filed before those dates. Although Plaintiffs did not receive an earlier response, Defendant never acted in bad faith. What is more, Plaintiffs have not and cannot reasonably claim any prejudice resulting from this brief delay, especially because the Court continued the then pre-trial deadlines in this case. And there is ample time for Plaintiffs and Defendant to work towards a mutually acceptable resolution to the instant discovery dispute. Finally, Plaintiffs should not receive a windfall in light of their abuse of the discovery process. *See Safeco*, 181 F.R.D. at 443-44 (C.D. Cal. 1998).

E. Plaintiffs' Discovery Motion No. 4.

1. Plaintiffs' Position.

Plaintiffs filed Discovery Motion No. 4 because GK provided only a single incomplete and evasive written response to 93 separate and narrowly drawn document requests. This Court granted the motion in its entirety.

a) Plaintiffs' Discovery Request and GK's Objections.

On June 11, 2015, Plaintiffs personally served GK with their Requests for Production of Documents, Set Two, consisting of 93 narrowly tailored requests. Dkt. 125, p. 2. Each document request related to a specific and limited subject, seeking, among other things: (1) retainer agreements between GK and the HRT Claimants; (2) time sheets of the GK attorneys who purportedly performed work on the HRT Litigation; (3) agreements, invoices and other records that would substantiate the costs listed in Defendants' "Case Cost Report" produced in discovery; (4) documents relating to the resolution of Medicare liens against the HRT Claimants; and (5) communications between GK and the HRT Defendants

1 relating to the satisfaction of conditions precedent in the Master Settlement
2 Agreement for release of the HRT settlement funds to GK. *Id.*

3 On August 14, 2015, GK served its responses. Once again, GK responded
4 over a month late. Dkt. 125, p. 3. Aside from boilerplate “General Objections,” the
5 responses consisted of a single response intended to address all 93 requests, which
6 stated in relevant part:

7 Defendant GK will make available to Plaintiffs the contents of the
8 entire case file in GK’s possession, custody or control, for the
9 approximately 140 individuals, including Plaintiffs herein, that GK
10 represented in the [HRT Litigation]. Defendant will make the HRT
Litigation documents in GK’s possession, custody or control available
to Plaintiffs for copying at GK’s offices

11 *Id.*, p. 20.

12 GK’s response was a classic data dump, providing no indication whether
13 documents existed that were responsive to any particular request and giving
14 Plaintiffs no assurances that all responsive documents would be made available,
15 instead proposing that Plaintiffs search through thousands of irrelevant documents.

16 **b) The Court’s Ruling Granting Plaintiffs’ Motion to Compel.**

17 Plaintiffs filed a motion to compel (i) a separate response to each request
18 without objection indicating whether responsive documents existed, and (ii) the
19 production of all responsive documents. Dkt. 125, p. 1. Plaintiffs also requested
20 that appropriate sanctions be imposed. *Id.*, p. 19.

21 At the hearing, Defendants effectively conceded that, once again, there was
22 no justification for their conduct:

23 **THE COURT:** My tentative . . . would be that the defendants
24 would be ordered to respond to each request for production, rather
25 than have one response that was, arguably, applicable to all of the
individual requests.

26 Second, the fact that documents might have previously been
27 produced or may have been required and not produced . . . it’s not
28 very persuasive as to why you couldn’t say, “Well, we’ve already
produced those documents.”

1 So I'm overruling the objection and ordering that to the extent
2 documents are already produced, you don't have to produce them
3 again, just say they've already been produced. If you don't have
4 documents, though, you have to make the statement that "we don't
have responsive documents," and if you do have responsive
documents and they weren't produce, then you should produce them.

5 **[DEFENDANTS' COUNSEL]:** . . . You're aware of our
6 position, I understand your tentative, and I think that's consistent
7 without your prior order so I'm not going to try to persuade you
otherwise.

8 Friedberg Decl., ¶ 10; Ex. P (Oct. 13, 2015 Hr. Tr.), p. 11.

9 This Court's order granting the motion in its entirety stated simply:
10 "Plaintiff's motion to compel is granted. Supplemental responses are due within 14
11 days from today's date as stated on the record." *See* Friedberg Decl., ¶ 3; Ex. D
12 ([Civil Minutes re] Plaintiff's Motion to Compel, Dkt. 176).⁹

13 **c) None of the Exceptions to Rule 37 Apply.**

14 **(i) *Plaintiffs Met and Conferred in Good Faith***
15 ***Before Filing Their Motion.***

16 Following Defendants' failure to respond by the deadline, Plaintiffs sent a
17 letter stating that no responses or objections had been received and requesting that
18 the parties meet and confer in person. Dkt. 125-1, ¶ 42, Ex. O. Defendants
19 promised to reply promptly and substantively, but did not. *Id.*, ¶¶ 43-44, Ex. P.
20 Plaintiffs subsequently sent a Joint Stipulation in support a their motion to compel
21 responses. *Id.*, ¶ 45, Ex. Q. The following day, GK responded that they had served
22 responses the night before via mail. The proof of service, however, indicated that
23 the responses had been served on the same day that Plaintiffs' sent the Joint
24 Stipulation. *Id.*, ¶ 46. The responses were received by mail five days later, but no
25 additional documents accompanied them. *Id.*, ¶ 48.

26
27
28 ⁹ The Court's ruling did not address Plaintiffs' request for attorney's fees. *See id.*

1 The parties engaged in a second round of telephonic meet-and-confer
2 discussions that covered numerous discovery issues, including responses to these
3 document requests. *Id.*, ¶ 50. Plaintiffs sent two additional follow up emails. *Id.*,
4 ¶ 51, Exs. T & U. GK indicated that its “entire file is available if you want to [sic]
5 schedule a time to view it,” and promised further responses within four days. *Id.*,
6 ¶ 52. GK’s further responses were never forthcoming. *Id.*, ¶ 53.

7 (ii) *GK’s Objections Were Not Substantially Justified.*

8 GK’s responses were again late, and therefore its objections were waived.
9 Dkt. 125, pp. 21-22. When they finally arrived, they were fatally deficient in a
10 number of respects, including: (i) GK failed to state whether it had conducted a
11 thorough search for responsive documents; (ii) GK’s response inviting Plaintiffs to
12 inspect and copy thousands of pages of unidentified documents to search for
13 specific responsive documents that may or may not exist was equivalent to no
14 response at all; and (iii) providing a single response to 93 different requests was
15 plainly impermissible. Dkt. 125, pp. 22-26.

16 (iii) *No Circumstances Make a Sanctions Award Unjust.*

17 There are no circumstances that would make an award of monetary sanctions
18 unjust. To the contrary, Defendants’ pattern and practice of discovery abuses
19 further supports the award of sanctions

20 **d) The Court Should Award Plaintiffs Sanctions of \$22,992.80.**

21 Plaintiffs’ counsel spent over 70.1 hours litigating this motion. Friedberg
22 Decl., ¶ 22. This includes time spent preparing and exchanging an initial Notice of
23 Motion, Joint Stipulation, declaration and supporting exhibits, all made obsolete by
24 GK’s belated responses; revising, exchanging and filing a new Notice of Motion, an
25 87-page Joint Stipulation and a 14-page declaration with 22 exhibits; preparing and
26 filing a 5-page Supplemental Memorandum and supplemental declaration with
27 exhibits; and preparing for and appearing and presenting argument at the hearing on
28 the matter. *See* Dkts. 125 to 125-11, 140 to 140-2. These hours are detailed in the

1 timesheets attached as **Exhibit U** to the Friedberg Declaration. Applying the \$328
2 blended rate, Plaintiffs are entitled to reasonable expenses of \$22,992.80. *Id.*

3 **2. Defendants' Position.**

4 **a) Defendants Complied with the Court's Order Granting**
5 **Plaintiffs' Discovery Motion No. 4.**

6 Initially, Defendant GK served its responses to Plaintiffs Request For
7 Production of Document, Set 2 ("RPD Set 2) via mail on August 13, 2015. It was
8 Defendants position that the majority of Plaintiffs 93 requests there, sought
9 information previously provided to Plaintiffs through GK's Initial Disclosures
10 served on August 26, 2014 and information previously sought by Plaintiffs in RPD
11 Set 1.

12 To Defendants, it was clear that there was significant overlap between the
13 individual requests comprising Plaintiffs' Requests for Production Set 1 and Set 2.
14 The overlap is so significant that some of Plaintiffs requests in Set 2 are nearly
15 identical to the requests made in Set 1. The requests contained in Set 2 so closely
16 replicate those in Set 1, that Plaintiffs' decision to propound RPD Set 2 while the
17 parties were still engaged in meet and confer efforts regarding Motion to Compel
18 Production of RPD Set 1, amounts to an abuse of the discovery process.

19 Following the Court's hearing on Plaintiffs' Discovery Motion No. 2 on
20 October 13, 2015, the Court entered its order granting the Motion on October 15,
21 2015, in which Defendants were ordered to produce responsive documents.
22 Defendants timely served their responses to RPD Set 2 on November 3, 2015 (per
23 an extension granted by Plaintiffs on October 27, 2015.)

24 **b) Plaintiffs' Delay in Seeking Discovery Sanctions is**
25 **Unreasonable**

26 A motion to compel and for sanctions must be brought within a reasonable
27 time after the alleged discovery violation. *Brandt v. Vulcan*, at 756. Failure to
28 respond within a reasonable time results in waiver. *Gault v. Nabisco Biscuit Co.*,

1 184 F.R.D. 620, 622 (D. Nev. 1999) (motion to compel further responses denied as
2 untimely when filed 136 days after receipt of the allegedly deficient responses
3 where there was no showing that delay was caused by matters outside counsel's
4 control).

5 Here, Plaintiffs bring this motion requesting monetary sanctions without
6 providing any explanation, let alone a reasonable one, for their delay in bringing
7 said motion. As such, it should be found that Plaintiffs' waived their ability to
8 impose sanctions as a result of waiting [# of days/months between] between the
9 time the Court entered its order granting Plaintiffs' Motion to Compel No. 4. (Dkt
10 No. 176) on October 13, 2015 and the filing of the instant Motion on [date].

11 **c) Sanctions are not Warranted under Rule 37.**

12 Federal Rule of Civil Procedure 37(a)(5)(A) provides that, even if a
13 discovery motion is granted, the court should not impose sanctions on the opposing
14 party if: the opposing party's nondisclosure, response, or objection was substantially
15 justified; or other circumstances make an award of expenses unjust. Fed. R. Civ.
16 P. 37(a)(5)(A). Here, Defendants' responses to the Interrogatories were
17 substantially justified.

18 Resisting discovery is "substantially justified when there is a "genuine
19 dispute" as to whether the discovery request was proper. *See* Fed. R. Civ. P. 37(a),
20 Advisory Committee Notes, 1970 Amendment. As the Supreme Court articulated
21 in *Pierce v. Underwood*, 487 U.S. 552 (1988):

22 "[T]he test for avoiding the imposition of attorney's fees for resisting
23 discovery in district court is whether the resistance was "substantially
24 justified." To our knowledge, that has never been described as
25 meaning "justified to a high degree," but rather has been said to be
26 satisfied if there is a "genuine dispute," or "if reasonable people could
27 differ as to [the appropriateness of the contested action]."

28 Id. at 565(internal citations omitted). The Court further explained that "the word
'substantially,' the one most naturally conveyed by the phrase before us here is not
'justified to a high degree,'" but rather "'justified in substance or in the main'—that

1 is, justified to a degree that could satisfy a reasonable person.” *Id.*; *see also United*
2 *States v. Yoffe*, 775 F.2d 447, 449-50 (1st Cir. 1985).

3 Here, reasonable people could have differed on the appropriateness of the
4 parties' dispute concerning GK's Responses to Plaintiffs' Request for Production of
5 Documents, Set 2. First of all, it appeared that many of the Plaintiffs' requests in
6 Set 2, were duplicative and encompassed by the requests in Set 1, which
7 Defendants had previously responded to in the form of initial responses and then
8 supplemental responses following the Court's order (and later, would submit further
9 supplemental responses following the Court's order denying Defendants' Motion for
10 Review.) As such, Defendants, in good faith, opposed Plaintiffs' motion to compel
11 on the following grounds: 1) that such a production result in duplicative and
12 cumulative information, it would also create an undue burden and consumption of
13 resources for Defendants given that responsive documentation was already in
14 Plaintiffs' possession, custody, and control; and 2) Defendant GK could not produce
15 documents that it did not have in its possession, custody, or control (Indeed, “if
16 [information] is not in the possession, custody or control of a party, then it clearly
17 cannot be turned over.” *DL v. District of Columbia*, 251 F.R.D. 38, 48 (D.D.C.
18 2008)); and 3) Defendants could not produce documents that did not exist and
19 documents requested by Plaintiffs that were merely the result of Plaintiffs searching
20 for theories of their case without knowing, or having reason to know, whether or
21 not they actually exist.

22 **F. Plaintiffs' Discovery Motion No. 5.**

23 **1. Plaintiffs' Position.**

24 Plaintiffs filed Discovery Motion No. 5 after GK again stood on objections
25 that had been waived by failing to serve timely responses; asserted objections
26 identical to those that had been overruled previously; and provided evasive, vague
27 and incomplete responses. This Court granted the motion.

1 **a) Plaintiffs’ Discovery Request and GK’s Objections.**

2 Plaintiffs’ Motion to Compel No. 5 sought responses to twelve
3 interrogatories that were part of Plaintiffs’ Interrogatories, Set One. Dkt. 152-1,
4 p. 2. The interrogatories sought specific information relating to GK’s receipt and
5 disbursement of the Settlement Funds; information relating to the nature and extent
6 of services provided by Justice Panelli and other vendors who were paid from the
7 Settlement Funds; the details of the \$850,000 in purported litigation costs; and
8 information relating to the bases for the affirmative defenses asserted in GK’s
9 Answer. *Id.*

10 GK served its responses one week late. Dkt. 152-1, p. 3. Each response
11 asserted the same boilerplate objections: (1) vague and ambiguous; (2) equally
12 available information; (3) information was already in Plaintiffs’ possession; (4) not
13 reasonably limited in time or scope; (5) not calculated to lead to admissible
14 evidence; (6) calls for a legal conclusion; (7) attorney work product;
15 (8) cumulative; (9) intended to harass; and (10) attorney client privilege. *Id.*,
16 pp. 12, 24, 28, 31, 34, 36, 38, 40, 42, 44, 46, 50. GK also provided incomplete,
17 superficial and vague answers, referred to documents that lacked the requested
18 information, and provided non-responsive information as a result of an
19 unreasonable interpretation of an interrogatory. *See id.*¹⁰

20 **b) The Court’s Ruling Granting Plaintiffs’ Motion to Compel.**

21 Plaintiffs’ motion sought non-evasive answers to the 12 interrogatories,
22 proper verifications and monetary sanctions. Dkt. 152-1, pp. 1, 55.

23
24
25 ¹⁰ By way of example, where GK was to specify the amount of each transfer
26 involved with the First, Second and Third Payments to the HRT Claimants, GK
27 responded “Various Amounts,” *id.*; GK refused to provide any information
28 concerning its affirmative defenses, *id.*, p. 51; and GK again failed to provide the
required verification, *id.*, p. 53.

1 On October 27, 2015, the Court heard oral argument. During the hearing,
2 GK's counsel did not attempt to defend any of GK's objections or responses.
3 Friedberg Decl., ¶ 11; Ex. Q (Oct. 27, 2015 Hr. Tr.), pp. 8-9.

4 The Court subsequently issued an order granting Plaintiffs' motion.
5 Friedberg Decl., ¶ 3; Ex. E (Order Granting Plaintiff's Discovery Motion No. 5,
6 Dkt. 190). The Court found that GK's interpretation of the interrogatories was
7 unreasonable and its answers unacceptably imprecise or insufficiently specific. The
8 Court ordered GK to provide substantive supplemental answers and proper
9 verifications to its prior response. *Id.*¹¹

10 c) **None of the Exceptions to Rule 37 Apply.**

11 (i) *Plaintiffs Met and Conferred in Good Faith Before*
12 *Filing Their Motion.*

13 Plaintiffs engaged in two rounds of meet and confer discussions in an attempt
14 to obtain substantive answers to their interrogatories, without the need for more
15 motion practice. In March 2015, Plaintiffs sent GK a detailed eight-page meet and
16 confer letter, setting forth the reasons why GK's boilerplate objections were
17 without merit, explaining why further responses were required and requesting that
18 GK provide proper verifications of its answers. Dkt. 152-2, ¶ 20, Ex. 16. The
19 parties also held three telephonic meet and confer conferences and exchanged
20 numerous emails. GK, however, refused to provide further responses. *Id.*, ¶¶ 21-
21 23.

22 Following the July 21, 2015 hearing on Plaintiffs' Discovery Motion No. 1,
23 Plaintiffs sent a second meet and confer letter, asking GK to reconsider its position
24 in light of the Court's order and comments made in granting that motion. *Id.*, ¶ 24;
25 Ex. 19. Defendants indicated that they would respond to this letter; but they never
26 did. *Id.*; *see also* Dkt. 109-2, Ex. O.

27
28 ¹¹ The Court reserved ruling on Plaintiffs' request for monetary sanctions. *Id.*

1 (ii) *GK's Objections Were Not Substantially Justified.*

2 The Court overruled every one of GK's objections without the need for
3 discussion and required GK to supplement every answer. The Court also found that
4 there was no justification for GK's failure to provide a proper verification.

5 (iii) *No Circumstances Make a Sanctions Award Unjust.*

6 There are no circumstances that would make an award of monetary sanctions
7 unjust. To the contrary, Defendants' pattern and practice of discovery abuses
8 further supports the award of sanctions.

9 d) **The Court Should Award Plaintiffs Sanctions of \$21,123.20.**

10 Plaintiffs' counsel spent over 64.4 hours litigating this motion. Friedberg
11 Decl., ¶ 23. This time consisted of preparing the second meet and confer letter;
12 preparing, exchanging and filing the Notice of Motion, a 61-page Joint Stipulation
13 and 9-page and 13-page declarations with 38 exhibits; preparing and filing a 5-page
14 Supplemental Memorandum; and preparing for and appearing and presenting
15 argument at the hearing on the motion. *See* Dkts. 152-1, 152-2, 152-4, 173. These
16 hours are detailed in the timesheets attached as **Exhibit V** to the Friedberg
17 Declaration. Applying the \$328 blended rate, Plaintiffs are entitled to reasonable
18 expenses of \$21,123.20. *Id.*

19 2. ***Defendants' Position.***

20 a) **Defendants' Objections Were Substantially Justified, thus**
21 **Making an Award of Expenses Unjust.**

22 Defendants adequately responded to Plaintiffs' Interrogatories, Set No. 1
23 (the "Interrogatories"), and Defendants should not be sanctioned for Plaintiffs'
24 failure to request specifically the information they sought to discover.

25 Defendants complied with Plaintiffs' discovery request by providing
26 information that, at the time, was in Defendants' possession or custody. For
27 example, Defendants complied with Interrogatory 3(e) by identifying "John
28 Howard" as the individual who authorized each withdrawal of funds from the

1 ESCROW ACCOUNT. According to Plaintiffs, however, that response was
2 insufficient because Interrogatory 3(e) “plainly” requested that Defendants
3 provide the “identity of the Person or persons who were authorized to instruct
4 Citibank to release the funds from escrow.” Plaintiffs cannot offer their
5 subjective interpretation on how Defendants *should have* read Interrogatory 3(e).
6 *See Thomas v. Cate*, (2010) 715 F.Supp.2d 1012, 1030-31 (E.D. Cal. 2010)
7 (applying a common sense reading of undefined terms in special
8 interrogatories). Moreover, Defendants are not required to respond with
9 information that satisfies each and every possible interpretation, including
10 Plaintiffs’ subjective interpretation, of Interrogatory 3(e), and the Interrogatories
11 in general.

12 Moreover, this is a case of breach of fiduciary duty and other related
13 claims—not one of legal malpractice. Plaintiffs have never alleged that
14 Defendants’ conduct caused them any harm arising from the settlement achieved
15 in the underlying HRT litigation for the 28 plaintiffs. Further, Plaintiffs’ have
16 not shown that obtaining Defendant GK’s financial information will ever allow
17 Plaintiffs to establish that they suffered any harm at all. Plaintiffs have not
18 alleged the harm, if any, they suffered as a result of the underlying settlement. In
19 other words, Plaintiffs allege that Defendants breached certain duties owed to
20 Plaintiffs, but fail to allege the losses suffered as a result of the alleged breach.
21 The information sought under this interrogatory will not assist Plaintiffs’ in
22 doing so. Accordingly, Defendants responses were substantially justified.
23 *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (“To our knowledge, that has
24 never been described as meaning “justified to a high degree,” but rather has been
25 said to be satisfied if there is a “genuine dispute,” or “if reasonable people could
26 differ as to [the appropriateness of the contested action].”).

G. Defendants Motion to Quash Plaintiffs' Document Subpoena to Torrey Pines Bank.

1. Plaintiffs' Position.

Plaintiffs opposed Defendants' motion to quash a document subpoena to Torrey Pines Bank ("TPB") for records related to the GK trust and operating accounts. Defendants' motion was untimely and premised on frivolous objections. The Court denied it, and ordered the records to be produced.

a) Plaintiffs' Discovery Requests and Defendants' Objections.

On March 3, 2015, Plaintiffs served a document subpoena on TPB. Dkt. 60-1, p. 7. The subpoena sought limited categories of bank records relating to GK's trust and operating accounts. *Id.*, p. 5. TPB was initially willing to comply, but after Defendants served objections, it refused to do so. *Id.*, p. 7.¹²

Defendants filed their motion to quash more than two months after TPB was required to produce the subpoenaed records. Dkt. 60-1, p. 17. Defendants contended that the subpoena sought irrelevant information, *id.*, pp. 13-14; the subpoena was harassing, vague, overly broad and unduly burdensome, *id.*, pp. 14-16; that the records requested were available from Defendants and/or other vendors, *id.*, p. 11; and that the subpoena was an unconstitutional invasion of the privacy rights of Defendants, the HRT Claimants, other GK clients and GK employees, *id.*, pp. 9-13.

To resolve the dispute, Plaintiffs proposed that the parties engage a neutral third party to review responsive bank records and redact the names and other identifying information of unrelated individuals and entities, and that the parties stipulate to the entry of a comprehensive protective order that would apply to all

¹² GK's objections did not permit TPB to withhold responsive records. A party's objections to a subpoena served on a third-party have no legal significance and do not excuse the subpoenaed party from complying with the subpoena. *See Moon v. SCP Pool Corp.* 232 F.R.D. 633, 636 (C.D. Cal. 2005).

1 confidential materials produced in discovery. Dkt. 60-1, pp. 7-8. Defendants
2 rejected these proposals. *Id.*

3 **b) The Court's Ruling Denying Defendants' Motion to Quash.**

4 The Court heard oral argument on the motion on June 16, 2015, after which
5 the Court denied GK's motion in a detailed, 10-page order. Friedberg Decl., ¶ 3;
6 Ex. G (Ruling on Defendants' Motion to Quash, Dkt. 79). The Court found that
7 "the Motion is untimely, and Defendants have waived their objections as a result."
8 *Id.*, p. 3. The Court explained:

9 Here, the Bank did not serve objections to the Subpoena by the
10 March 17th compliance date. Defendants served objections prior to
11 March 17th, but as set forth above, those objections were
12 insufficient to preserve Defendants' objections. Moreover,
13 Defendants did not file the Motion until May 22nd. Accordingly,
14 the Motion is untimely and Defendants have failed to preserve their
15 objections.

16 *Id.*

17 The Court nonetheless considered the merits of Defendants' objections,
18 finding them all to be spurious. With regard to the privilege objection, the Court
19 held that "Defendants have failed to meet their burden" because the financial
20 documents were neither transmitted in confidence nor contained legal opinions. *Id.*,
21 p. 6. The Court also rejected Defendants' privacy objections, finding Plaintiffs
22 requests to be "limited in scope" and "measured"; that "Plaintiffs' allegations of
23 conversion and commingling . . . warrant discovery into Bank accounts"; and that
24 Plaintiffs' protective order and redaction proposals were "sufficient to assuage
25 Defendants' privacy concerns" *Id.*, p. 8. The Court overruled Defendants'
26 remaining boilerplate objections, finding that they merited little discussion. *Id.*, pp.
27 8-10.

1 c) **None of the Exceptions to Rule 37 Apply.**

2 (i) *Plaintiffs Met and Conferred in Good Faith.*

3 The parties met and conferred at Plaintiffs' request to no avail. Dkt. 60-4,
4 ¶¶ 40-45. As noted above, Defendants rejected the protective order and redaction
5 procedures Plaintiffs proposed to address Defendants' purported privacy concerns.
6 *See id.*

7 (ii) *Defendants' Objections Were Not Substantially Justified.*

8 Defendants' motion was untimely and unjustified. Defendants refused to
9 produce bank records in their possession and control, and then moved to quash the
10 TPB subpoena on the grounds that Plaintiffs should have sought the documents
11 from Defendants. In addition, Defendants' motion was untimely.

12 (iii) *No Circumstances Make a Sanctions Award Unjust.*

13 There are no circumstances that would make an award of monetary sanctions
14 unjust. To the contrary, Defendants' pattern and practice of discovery abuses
15 further supports the award of sanctions.

16 d) **The Court Should Award Plaintiffs Sanctions of \$31,488.00.**

17 Plaintiffs' counsel spent 96.0 hours litigating this key motion. Friedberg
18 Decl., ¶ 24. This time includes meet and confer efforts by email, telephonically and
19 in person; preparing and filing the Notice of Motion, the 38-page Joint Stipulation,
20 a 12-page declaration with 150 pages of exhibits, and a 5-page Supplemental
21 Memorandum; and preparing for and appearing and presenting argument at the
22 hearing on the motion. *See* Dkts. 60-1, 60-4, 60-5, 61. These hours are detailed in
23 the timesheets attached as **Exhibit W** to the Friedberg Declaration. At the \$328
24 blended rate, Plaintiffs are entitled to reasonable expenses of \$31,488.00. *Id.*

1 **2. Defendants' Position.**

2 **a) Defendants Complied with the Court's Order Denying**
3 **Defendants' Motion to Quash the Torrey Pines Bank**
4 **Subpoena**

5 Sanctions under discovery rules are available if, and only if, a party violates a
6 discovery order; absence of order precludes sanctions. See *Brandt v. Vulcon, Inc.*,
7 30 F. 3d 752 (7th Cir. 1994, rehearing and suggestion for rehearing en bane
8 denied). On May 22, 2015, Defendants filed the Motion to Quash for which
9 Plaintiffs seek sanctions here (Dkt No. 60.). Defendants filed said Motion on the
10 grounds that the Subpoena for Production of Records is overbroad and not
11 reasonably calculated to lead to the discovery of admissible evidence in that it
12 improperly seeks confidential financial records, as well as privileged documents,
13 from Defendants' bank and that Plaintiffs have no compelling need for seeking
14 these confidential and privileged records, so as to justify their unreasonable
15 invasion of Defendants privacy rights, including that of the Defendant law firm's
16 clients and employees After the Court denied the Motion to Quash (Dkt. No. 79),
17 Torrey Pines Bank responded to said subpoena.

18 **b) Plaintiffs' Delay in Seeking Discovery Sanctions is**
19 **Unreasonable**

20 A motion to compel and for sanctions must be brought within a reasonable
21 time after the alleged discovery violation. *Brandt v. Vulcan*, at 756. Failure to
22 respond within a reasonable time results in waiver. *Gault v. Nabisco Biscuit Co.*,
23 184 F.R.D. 620, 622 (D. Nev. 1999) (motion to compel further responses denied as
24 untimely when filed 136 days after receipt of the allegedly deficient responses
25 where there was no showing that delay was caused by matters outside counsel's
26 control).

27 Here, Plaintiffs bring this motion requesting monetary sanctions without
28 providing any explanation, let alone a reasonable one, for their delay in bringing

1 said motion. As such, it should be found that Plaintiffs' waived their ability to
2 impose sanctions as a result of waiting [# of days/months between] between the
3 time the Court entered its order denying Defendants' Motion to Quash (Dkt No. 79)
4 on July 13, 2015 and the filing of the instant Motion on [date].

5 **c) Sanctions are not Warranted under Fed. R. Civ. P. 37.**

6 Federal Rule of Civil Procedure 37(a)(5)(A) provides that, even if a
7 discovery motion is granted, the court should not impose sanctions on the opposing
8 party if: the opposing party's nondisclosure, response, or objection was substantially
9 justified; or other circumstances make an award of expenses unjust. Fed. R. Civ.
10 P. 37(a)(5)(A). Here, Defendants' responses to the Interrogatories were
11 substantially justified.

12 Resisting discovery is "substantially justified when there is a "genuine
13 dispute" as to whether the discovery request was proper. *See* Fed. R. Civ. P. 37(a),
14 Advisory Committee Notes, 1970 Amendment. As the Supreme Court articulated
15 in *Pierce v. Underwood*, 487 U.S. 552 (1988):

16 "[T]he test for avoiding the imposition of attorney's fees for resisting
17 discovery in district court is whether the resistance was "substantially
18 justified." To our knowledge, that has never been described as
19 meaning "justified to a high degree," but rather has been said to be
20 satisfied if there is a "genuine dispute," or "if reasonable people could
21 differ as to [the appropriateness of the contested action]."

22 *Id.* at 565(internal citations omitted). The Court further explained that "the word
23 'substantially,' the one most naturally conveyed by the phrase before us here is not
24 'justified to a high degree,'" but rather "'justified in substance or in the main'—that
25 is, justified to a degree that could satisfy a reasonable person." *Id.*; *see also United*
26 *States v. Yoffe*, 775 F.2d 447, 449-50 (1st Cir. 1985).

27 Certainly, especially on the basis that the subpoena implicated privacy rights
28 of persons not involved with or related to the instant litigation, reasonable persons
could differ on the dispute and, thus Defendants were justified in moving to quash
the subpoena. In moving to quash the subpoena, it was Defendants' position that the
disclosure of information sought violated the Defendants' constitutional right to

1 privacy, as well as the rights of other persons (e.g. HRT Plaintiffs not named as
2 Plaintiffs in the underlying litigation, GK employees, GK clients) not involved in
3 this lawsuit. It was clear to Defendants that in balancing the right of a civil litigant
4 to discover relevant facts with a party's right to maintain reasonable privacy in
5 sensitive affairs, the factors weighed in favor of nondisclosure of Defendants'
6 confidential information.

7 **H. This Discovery Motion No. 7 for Monetary Sanctions as**
8 **Prevailing Party in Prior Discovery Motions.**

9 ***1. Plaintiffs' Position.***

10 Plaintiffs were required to file this Motion No. 7 after Defendants refused to
11 pay Plaintiffs' reasonable expenses incurred in successfully bringing four motions
12 to compel discovery, opposing one motion to quash a subpoena and opposing one
13 motion for review of a discovery order. Rule 37 provides that Plaintiffs are entitled
14 to their expenses incurred in preparing and prosecuting a motion such as this, to
15 recover their reasonable expenses incurred in connection with the filing and
16 prosecution of earlier discovery motions.

17 **a) Applicable Legal Authority Supports**
18 **"Fees on Fees" under Rule 37.**

19 It is well settled that "time spent litigating fee petitions is compensable."
20 *Matlink, Inc. v. Home Depot U.S.A., Inc.*, 2008 WL 8504767, at *6 (S.D. Cal. 2008)
21 (awarding fees under Rule 37 for hours preparing fees application); *see True Health*
22 *Chiropractic Inc v. McKesson Corp.*, 2015 WL 3453459, at *1 (N.D. Cal. 2015)
23 ("Parties may also seek reasonable attorneys' fees for work performed on the
24 application for attorneys' fees and costs ('fees on fees')."); *SOC-SMG, Inc. v.*
25 *Christian & Timbers*, 2010 WL 2085076, *7 (D. Nev. 2010) (awarding fees under
26 Rule 37 for "fees on fees"); *Sure Safe Indus. Inc. v. C & R Pier Mfg.*, 152 F.R.D.
27 625, 627 (S.D. Cal. 1993) ("Attorneys' fees in preparation of requests for attorneys'
28 fees sanctions are recoverable under Rule 37"). As the Ninth Circuit has explained,

1 compensation for time spent litigating a fee petition “must be included in
2 calculating a reasonable fee because uncompensated time spent on petitioning for a
3 fee automatically diminishes the value of the fee eventually received.” *Anderson v.*
4 *Dir., Office of Workers Comp. Programs*, 91 F.3d 1322, 1325 (9th Cir. 1996).

5 **b) None of the Exceptions to Rule 37 Apply.**

6 *(i) Plaintiffs Met and Conferred in Good Faith.*

7 Prior to bringing this motion, Plaintiffs’ counsel met and conferred in person
8 with Defendants’ counsel in an effort to resolve this matter without the need for
9 motion practice. Friedberg Decl., ¶¶ 27-28. Defendants’ counsel indicated that
10 Defendants intended to oppose the motion. *Id.*

11 *(ii) Defendants’ Objections Were Not Substantially Justified.*

12 For several reasons, there is no basis to Defendants’ opposition to this
13 motion. *First*, Plaintiffs prevailed without limitation on all of the motions that are
14 the subject of this motion, and Defendants were not substantially justified in raising
15 and standing on their many objections, which this Court overruled as without merit.
16 *Second*, meritless objections continued despite the Court’s warnings to Defendants
17 that it would impose sanctions if they continued to shirk their discovery obligations.
18 *Third*, Defendants persisted in raising arguments that had already been rejected and
19 objections that were untimely and had been waived.

20 *(iii) No Circumstances Make a Sanctions Award Unjust.*

21 There are no circumstances that would make an award of monetary sanctions
22 unjust. To the contrary, Plaintiffs were required to file this Motion because
23 Defendants have been engaged in a pattern and practice of discovery abuses, one
24 consequence of which was Defendants losing eight discovery motions.

25 **c) The Court Should Award Plaintiffs Sanctions of \$27,683.20.**

26 Plaintiffs’ counsel have, to date, spent over 69.4 hours preparing the Notice
27 of Motion, this Joint Stipulation, and a 9-page declaration with 27 exhibits.
28 Friedberg Decl., ¶ 25. These hours are detailed in the timesheets attached as

1 **Exhibit X** to the Friedberg Declaration. Plaintiffs anticipate spending a total of 15
2 hours finalizing and filing the Joint Stipulation pursuant to Local Rule 37;
3 preparing and finalizing a 5-page Supplemental Memorandum; and preparing for
4 and appearing and presenting argument at the hearing on this motion. *Id.*, ¶ 25.
5 Plaintiffs therefore anticipate devoting a total of 84.4 hours to litigating this motion.
6 Based on a blended rate of \$328 per hour, Plaintiffs are entitled to reasonable fees
7 of \$27,683.20. *Id.*

8 **2. Defendants' Position.**

9 Although there are no express time limits for filing a motion for sanctions,
10 under a court's inherent authority, "unreasonable delay" may render such a motion
11 untimely. See *Long v. Howard Univ.*, 561 F. Supp. 2d 85, 91 (D.D.C. 2008) (citing
12 *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 (7th Cir. 1994)). The timeliness of a
13 motion for sanctions relating to discovery "depends on such factors as when the
14 movant learned of the discovery violation, how long he waited before bringing it to
15 the court's attention, and whether discovery has been completed." *Id.*

16 But, as articulated throughout, Plaintiffs have waited multiple months after
17 the Court entered orders determining that Plaintiffs were the prevailing parties in
18 eight discovery motion at issue in the instant Motion. The unaccounted for delay in
19 prevailing and moving for sanctions should be deemed unreasonable. For example,
20 the **eight (8) months** that have elapsed between the Court's order denying
21 Defendants' Motion for Review (Dkt. 114) and the filing of this motion and Such a
22 determination of delay support in the very fact that Plaintiffs do not offer, or even
23 suggest, one explanation as to why they have delayed in bringing this motion is
24 patently unreasonable and cannot be said to have been brought in good faith or in
25 the spirit of discovery. The motion for sanctions per se untimely and, as such,
26 should be denied. See *Brandt*, 30 F.3d at 757 (unreasonable delay rendered motion
27 for sanctions untimely where plaintiff had notice of possible discovery abuses years
28 before); *Stevens v. Lawyers Mut. Liability Ins. Co.*, 789 F.2d 1056, 1061 (4th Cir.

1 1986) (sanctions motion filed eight months after allegedly offending act and four
2 months after hearing was untimely); *Am. Nat'l Prop. & Cas. Co. v. Campbell Ins.,*
3 *Inc.*, 2011 WL 3021399, at *3 (M.D. Tenn.) (motion for sanctions untimely where
4 alleged spoliation occurred fourteen months earlier and discovery had been closed
5 for four months); *Benet v. Schwartz*, 1995 WL 549125, at *1 (N.D. 11.) (sanctions
6 remedy for discovery abuse accrues at close of discovery; motion filed six months
7 later untimely).

8 **III. PLAINTIFFS' REQUEST FOR MONETARY SANCTIONS**
9 **PURSUANT TO 28 U.S.C. § 1927 AND**
10 **THE COURT'S INHERENT AUTHORITY**

11 **A. Plaintiffs' Position.**

12 The Court is vested with the power to sanction a litigant or his attorney who
13 engages in bad faith litigation pursuant to 28 U.S.C. § 1927. Section 1927
14 provides:

15 Any attorney or other person admitted to conduct cases in
16 any court of the United States or any Territory thereof who so
17 multiplies the proceedings in any case unreasonably and
18 vexatiously may be required by the court to satisfy personally the
excess costs, expenses, and attorneys' fees reasonably incurred
because of such conduct.¹³

19 "To be sanctionable under § 1927 . . . counsel's conduct must multiply the
20 proceedings in both an unreasonable and vexatious manner." *In re Girardi*, 611
21 F.3d 1027 (9th Cir. 2010); *see U.S. v. Rico*, 619 Fed. Appx. 595, at *4 (9th Cir.
22 2015) ("What is required is recklessness plus something more . . . for example
23 knowledge, intent to harass, or frivolousness."). As explained by the Ninth Circuit
24 in a case in which it formally reprimanded Mr. Girardi:

25 ¹³ GK, Mr. Girardi and Mr. O'Callahan are subject to sanctions under 28 U.S.C.
26 §1927 because they are attorneys of record in this proceeding, and have signed
27 discovery responses, served objections, participated in meet and confer discussions,
28 authored pleadings, executed declarations and attended discovery hearings.
Dkt. 60-1, p. 38; Dkt. 97, p. 10.

1 The key term in the statute is “vexatiously” . . . what is clear from
2 our case law is that a finding that the attorney recklessly or
3 intentionally misled the court is sufficient to impose sanctions
4 under § 1927, and a finding that the attorneys recklessly raised a
frivolous argument which resulted in the multiplication of the
proceedings is also sufficient to impose sanctions under § 1927.

5 *Id.* at 1061.

6 The Court may also assess monetary sanctions under its inherent power,
7 pursuant to which it may “assess attorney’s fees when a party has acted in bad faith,
8 vexatiously, wantonly, or for oppressive reasons.” *Chambers v. Nasco, Inc.*, 501
9 U.S. 32, 46 (1991); *see also Fink v. Gomez*, 239 F.3d 989, 993-94 (9th Cir. 2001)
10 (“sanctions under a court’s inherent power . . . are available if the court specifically
11 finds bad faith or conduct tantamount to bad faith,” such as “recklessness when
12 combined with an additional factor such as frivolousness, harassment, or an
13 improper purpose”); *Primus Auto. Fin. Servs., Inc. v. Batarse*, 115 F.3d 644, 648
14 (9th Cir. 1997) (“a finding of bad faith is warranted where an attorney knowingly or
15 recklessly raises a frivolous argument, or argues a meritorious claim for the purpose
16 of harassing an opponent”) (internal quotation marks omitted).

17 The Ninth Circuit recently affirmed that a district court has inherent authority
18 to award “all the attorneys’ fees and costs incurred by the plaintiffs,” where the
19 defendants’ bad faith responses to discovery “permeated the entirety of this case.”
20 *Haeger v. Goodyear Tire & Rubber Co.*, 813 F. 3d. 1233, 1247 (9th Cir. 2016)
21 (awarding all fees incurred from the time of the “first definitive proof that [the
22 defendant] was not going to cooperate in the litigation process”). In *Goodyear*, the
23 defendant and its counsel were sanctioned more than \$2.7 million for failing to
24 produce key test results in response to written discovery requests, while
25 representing to the district court and the requesting party that it had conducted a
26 reasonable search for responsive information. In language that could apply equally
27 to Defendants’ conduct in this case, the district court found that the defendants

1 there had “adopted a plan of making discovery as difficult as possible, providing
2 only those documents they wished to provide, timing the production of the small
3 subset of documents they were willing to turn over such that it was inordinately
4 difficult for Plaintiffs to manage their case, and making false statements to the
5 Court in an attempt to hide their behavior.” *Id.* at 1245.

6 The record in this case is replete with instances of Defendants’ bad faith
7 litigation tactics and intentional discovery violations. These include:

- 8 • Filing a materially false declaration under penalty of perjury in support
9 of Defendants’ motion to compel arbitration before Justice Panelli,
10 Dkt. 202-2, p. 17;
- 11 • Withholding critical documents in contempt of three court orders, *id.*,
12 pp. 11-16;
- 13 • Withholding unfavorable documents related to Justice Panelli until
14 after his deposition was complete, *id.*, p. 18;
- 15 • Failing to perform a reasonable search for responsive documents and
16 making untrue and misleading representations to the Court regarding
17 whether responsive documents had been produced, *id.*;
- 18 • Refusing to enter into a protective order to delay discovery on the
19 basis of purported confidentiality and privacy concerns, *id.*;
- 20 • Producing a falsified and altered “Case Cost Report” in discovery, *e.g.*,
21 Dkt. 152-2, ¶¶ 15-16; and
- 22 • Failing to meet and confer in good faith and using the meet and confer
23 process to cause further delays, Dkt. 106-2, ¶¶ 46-54.

24 Notably, this is not the only case in which a court has been faced with
25 Defendants’ serial discovery violations and intentional disregard of court orders. In
26 another case in which GK and Mr. Girardi were alleged to have misappropriated
27 settlement funds, Superior Court Judge William Highberger recently found that
28 “Defendants violat[ed] the Court’s Order by their failure to produce the electronic

1 data base files tracking the trust account transactions relating to the Lockheed
2 settlement proceeds and the written reports and all cancelled checks and all bank
3 statements of such trust accounts and disbursements.” Friedberg Decl., ¶ 26; Ex. Y
4 (Jan. 28, 2016 order in *Gutierrez v. Thomas V. Girardi, et al.*, Los Angeles Superior
5 Court Case No. BC 400560), p. 5. For violating discovery orders in that case,
6 Judge Highberger imposed monetary sanctions totaling over \$70,000. *Id.*, pp. 11-
7 24. He also went further, precluding GK and Mr. Girardi from introducing
8 evidence at trial of their claimed costs and attorney’s fees, ruling that:

9 Here Defendants have claimed to have incurred millions of dollars of
10 costs, but have not produced all backup documentation and cancelled
11 checks support[ing] such alleged costs as ordered by the Court.
12 Defendants are therefore precluded at trial from claiming any
13 deductions for costs.

14 In addition, Defendants have claimed the right to charge Plaintiff 40%
15 for fees, but have not produced any documents showing, as ordered,
16 how much in fees were allocable to Plaintiff and were taken from each
17 of [the] settlements in which Plaintiff participated. Accordingly,
18 Defendants are precluded at trial from claiming any deduction for
19 fees.

20 *Id.*, pp. 24-25.

21 The Court may properly consider this misconduct in assessing monetary
22 sanctions in the present case. *See Adriana Int’l Corp. v. Theoren*, 913 F.2d 1406,
23 1411 (9th Cir. 1990) (“in evaluating the propriety of sanctions, [the Court is to]
24 look at all incidents of a party’s misconduct”); *Henry v. Gill Industries, Inc.*, 983
25 F.2d 943, 947 (9th Cir. 1993) (court may properly consider all incidents of party’s
26 misconduct in assessing sanctions under Rule 37); *In re Heritage Bond Litig.*, 223
27 F.R.D. 527, 530 (C.D. Cal. 2004) (Chapman, M.J.) (“The Court may, in deciding
28 whether to grant a motion for sanctions, ‘properly consider all of a party’s
discovery misconduct . . . , including conduct which has been the subject of earlier
sanctions.’”) (citation omitted).

B. Defendants' Position.

It is well-settled that “[p]unishment under [28 U.S.C. § 1927] is sparingly applied, and ‘except when the entire course of proceedings were unwarranted and should neither have been commenced nor persisted in, an award under 28 U.S.C. § 1927 may not shift the entire financial burden of an action's defense.’” F.D.I.C. v. Calhoun (5th Cir. 1994) 34 F.3d 1291, 1297.

B.K.B. v. Maui Police Dept., 276 F.3d 1091 (9th Cir. 2002) is instructive on what constitutes sanctionable conduct. In *B.K.B. v. Maui Police Department*, the court found “counsel's reckless *and* knowing conduct” to be “tantamount to bad faith and therefore sanctionable under the court's inherent power.” *Id.* at 1108. *B.K.B.* was a sexual harassment suit, in which defense counsel introduced testimony in violation of Federal Rule of Evidence 412. Defense counsel introduced this testimony after two Rule 412 pre-trial motions had been denied, and after he assured the district judge in a sidebar that the anticipated testimony would not violate Rule 412. *Id.* at 1107. The court concluded that “defense counsel's introduction of [the] testimony was a knowing and intentional violation of Rule 412” and further held that “[i]f left unsanctioned, defense counsel's behavior in this case would undermine the very purpose and force of Rule 412's strictures.” *Id.* at 1108.

B.K.B. is entirely distinguishable from the instant case, because Plaintiffs have failed to show that Defendants intentionally made any affirmative misrepresentations to the court concerning discovery. Unlike the “knowing and intentional violation” at issue in *B.K.B.*, Defendants here have not acted in bad faith throughout the discovery process.

Assuming, *arguendo*, that Plaintiffs can make a showing of bad faith, such a showing would not warrant sanctions under 28 U.S.C. § 1927. “The statute indicates that actions that multiply the proceedings must be both unreasonable and vexatious, and we have also stated that recklessness alone will

1 not suffice. What is required is recklessness plus something more—for example
2 knowledge, intent to harass, or frivolousness.” United States v. Rico, 619 F.
3 App’x 595, 601 (9th Cir. 2015) (citing *B.K.B.*, 276 F.3d at 1107. Plaintiffs have
4 failed to satisfy their burden under § 1927. Thus, sanctions are not warranted.

5 In determining whether sanctions are appropriate under § 1927, the Court
6 may consider only past conduct relating to the litigation in which sanctions are
7 sought. Plaintiffs cite to past cases, entirely separated and unrelated to this case,
8 where the court has admonished Defendant GK for alleged abuse of the judicial
9 process. These cases are irrelevant to do not support Plaintiffs’ position.

10 Plaintiffs cite to *Adriana Int’l Corp. v. Theoren*, 913 F.2d 1406 for the
11 proposition that “in evaluating the propriety of sanctions, [the Court is to] look at
12 all incidents of a party’s misconduct.” *Id.* at 1411. However, the Court’s discussion
13 in *Adriana* makes clear that the Court may only consider misconduct that occurred
14 in the present case: “The court also found that [Plaintiff] failed to produce
15 documents throughout the litigation. As set out in the facts, [Plaintiff] failed to
16 produce any of the ordered documents on several occasions and, at other times,
17 complied only partially with production orders.” *Id.* Accordingly, “in evaluating
18 the propriety of sanctions,” if any, the Court is limited to evaluating Defendants’
19 conduct as it pertains to *this case*.

20 IV. CONCLUSION.

21 A. Plaintiffs’ Conclusion.

22 Plaintiffs respectfully request that the Court order that Defendants pay
23 Plaintiffs their reasonable expenses in the amount of **\$151,175.20**, or such other
24 amount as the Court may order.

25 //

26 //

27 //

28 //

B. Defendants' Conclusion.

Defendants respectfully request that the Court deny Plaintiffs' Motion for Monetary Sanctions in its entirety.

DATED: May 13, 2016

ISAACS | FRIEDBERG LLP

/s/ Jeffrey B. Isaacs

JEFFREY B. ISAACS, Esq.

Attorneys for Plaintiffs

DATED: May 13, 2016

BAKER, KEENER & NAHRA, LLP

/s/ Phillip A. Baker

ROBERT C. BAKER

PHILLIP A. BAKER

Attorneys for Defendants